No. 55

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In the Supreme Court of the United States

OCTOBER TERM, 1944

PACIFIC GAS & ELECTRIC COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Pacific Gas and Electric Company

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Brief of Pacific Gas and Electric Company

This cause is here on writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit (R 1776), which affirmed, by an equally divided court (R 1741), an order of the Securities and Exchange Commission (R 1883, 1932) denying the application of Pacific Gas and Electric Company for an order, pursuant to Section 2(a)(8) of the Public Utility Holding Company Act of 1935, declaring it to be not a subsidiary of The North American Company, a registered holding Company. The effect of the order if not set aside, will be to subject

Pacific Gas to the obligations, duties and liabilities imposed by the Act.[1]

OPINIONS BELOW

The decision in the Circuit Court of Appeals (six judges participating), affirming the order of the Commission by an equally divided court, and also the dissenting opinion, are reported in 139 F.2d 298. The prior opinions in the Circuit Court of Appeals (three judges sitting) are reported in 127 F. 2d 378. The opinion and order of the Commission, dated September 10, 1941, is reported in 10 S.E.C. 39.

JURISDICTION

The judgment of the court below was entered November 18, 1943 (R 1776). A timely petition for rehearing was filed, and was denied February 23, 1944 (R 1777), at which time the court *sua sponte* entered an order continuing in effect the stay of the order of the Commission theretofore granted and likewise staying its mandate until after this Court disposes of a petition for certiorari, if such petition be filed on or before April 10, 1944. Said order was clarified by a further order made on October 9, 1944.

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[1] For convenience, Pacific Gas and Electric Company will be called Pacific Gas; the Securities and Exchange Commission, the Commission; The North American Company, North American; and the Public Utility Holding Company Act of 1935, the Act.

NOTE: All emphasis is supplied by us unless otherwise noted.

A petition for certiorari was filed on April 10, 1944, and was granted by this Court on May 22, 1944.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347), and under Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79x).

SUMMARY

Pacific Gas is a California public utility company, all of whose operations are carried on in that State. North American is a registered public utility holding company with its offices in New York City. At the time of the hearing it owned 17.71% of the stock of Pacific Gas.[1]

The Act (the pertinent provisions of which are printed in the Appendix) provides in Section 2(a)(8) that any utility company 10% or more of the voting stock of which is owned by a holding company

[1]The S. E. C. brief in opposition to the petition herein states (p. 3):

> "North American has committed itself to a program of systematic disposition of its P.G.& E. stock. It is also under order to dispose of that stock and it urged no error in that determination except the general constitutional question now pending on a special calendar in this court."

North American's holdings have already been reduced to 13.2% of the stock of Pacific Gas, by periodical distributions of such stock as dividends on the stock of North American.

is a subsidiary company of such holding company, and subject to regulation under the Act, "unless the Commission * * * by order declares such company not to be a subsidiary company * * *." The Act further provides that

> "The Commission, upon application, *shall* by order declare that a company is not a subsidiary company of a specified holding company * * * if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company, * * * (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company * * * so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies."[1]

On November 29, 1935, Pacific Gas filed with the Commission its application for a declaration that it is

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[1]The Commission in its opinion does not contend that Pacific Gas is controlled by North American or that it is an intermediary company through which North American controls any other company, and these two features are not in the case. Pacific Gas contends that the evidence shows that its management and policies are not subject to the controlling influence of North American; this being so, requirements (i) and (ii) mentioned above are fulfilled in any event, since if no controlling influence exists, no control can exist.

not a subsidiary of North American. The application was heard in 1940, and on September 10, 1941, the Commission entered the order complained of denying the application upon the ground that Pacific Gas had failed to demonstrate that its management and policies are not subject to the controlling influence of North American.

Three facts were found by the Commission or are admitted: (1) that North American has never at any time controlled Pacific Gas, nor exercised a controlling influence over its management or policies; (2) there have never been any intercorporate transactions of any kind between North American and Pacific Gas either before or since North American became a stockholder in Pacific Gas; and (3) none of the evils enumerated in the Act, and which the Act was designed to eliminate, existed with respect to Pacific Gas.

Pacific Gas contends that such order is invalid and should be set aside because (1) in making said order the Commission misinterpreted and misapplied the Act and committed various other errors of law; and (2) the order of the Commission is not supported by substantial evidence and is in direct conflict with the only relevant, competent and persuasive evidence in the record—all of which shows that the management and policies of Pacific Gas are not subject to the controlling influence of North American.

STATEMENT OF THE CASE

The Statute.

The pertinent provisions of the Act are printed in the Appendix, pages 1 to 14.

As indicated by its title (An Act to Provide for Control and Regulation of Public-Utility Holding Companies, and for other purposes) the Act was passed to eliminate the evils attributable to interstate public utility holding companies. These evils (recited in Section 1, Appendix page 1) arise from ineffective state regulation and transactions between holding companies and their subsidiaries not carried out at arms length.

Its declared objective is to meet the problems and eliminate the evils which are "connected with public utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce" and to that end to eliminate such holding companies except as otherwise expressly provided in the Act (Sec. 1).

Local utilities are subject to the Act when they constitute part of a public utility holding company system and as such become subsidiaries as defined in the Act.

The test of whether a particular public utility company is such a subsidiary is whether a holding company controls it, or has a controlling influence over its management or policies.[1]

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[1]The Commission's construction of the Act in this particular is radically different, and is discussed in detail below.

Section 2(a)(8) of the Act provides a procedure for determining whether such control or controlling influence exists. If less than 10% of the voting stock of the local utility is owned by the holding company, then the local company is not deemed a subsidiary unless the Commission initiates a proceeding and, after hearing, finds that it is controlled by or subject to the controlling influence of the holding company. On the other hand, if 10% or more of the voting stock of the local utility is owned by the holding company, then the local utility is deemed to be a subsidiary unless it makes application for a declaration that it is not a subsidiary. If it does make such an application, it is excluded from the Act unless and until the Commission, after notice and hearing, denies the application. It is mandatory upon the Commission to declare that the applicant is not a subsidiary if it finds that it is not controlled by, and that its management or policies are not subject to the controlling influence of, the holding company.

Even though the Commission finds that a controlling influence exists, it must nevertheless hold that a local utility is not a subsidiary if it finds that it is not "necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties and liabilities imposed in this title upon subsidiary companies of holding companies."

Finally, the Commission may make its order granting the application conditional upon the applicant ap-

plying periodically for a renewal of the order, and filing periodic reports to enable the Commission to determine that the conditions (absence of control or controlling influence) are satisfied during the period for which the order is effective, and it may revoke or modify its order whenever it judges any of such conditions is not satisfied.

This latter provision was obviously intended to cover those cases where at the time of the hearing no control or controlling influence existed, but where such conditions might possibly arise in the future.

Proceedings Before the Commission.

On November 29, 1935, Pacific Gas filed its application under Section 2(a)(8) of the Act, seeking a declaration that it is not a subsidiary of North American.

Five years later the matter was assigned for hearing before a trial examiner, which hearing commenced November 12, 1940, and concluded January 16, 1941.

Hearing Before the Examiner.

The hearing was adversary in character, and the Commission's case, as well as that of Pacific Gas, was presented exhaustively.

Representatives of the Commission, prior to the hearing, examined the files of both North American and Pacific Gas, and admittedly every letter or paper deemed to bear upon the issue was introduced in evidence by the Commission (R 1295). In addition, Commission representatives had examined the records of

the Telephone Company to ascertain the number of telephone calls passing between North American and Pacific Gas. These were found to be between four and nine each year (R 1162).

The record of testimony covers 1685 typewritten pages. Of these, 541 pages represent examination by Pacific Gas counsel, and 711 pages by Commission counsel. 194 exhibits were introduced, 141 of them by Commission counsel.

It is fair to say that there was not a single fact, act or circumstance, during the entire 11 years that North American has been a stockholder of Pacific Gas, that was not thoroughly explored at the hearing. Every director and principal officer of Pacific Gas was examined, and so also were the principal officers of North American.

Upon invitation of the Commission, the California Railroad Commission appeared and participated. It showed that under the California Public Utility Act, Pacific Gas, since 1912, has been subject to its regulation, which covers all phases of its activities, and that it had been before the Commission in more than 900 proceedings. The Railroad Commission's statement concluded:

> "* * * we are aware of no instance during the course of this Commission's regulation of Pacific Gas and Electric Company when its management or policies appear to have been either controlled or influenced by North American Company. We may add that we perceive no public

interest existing within the State of California, either for the protection of investors or consumers, which compels the conclusion that applicant, Pacific Gas and Electric Company, should be declared subject to the obligations and duties imposed by the federal Holding Company Act upon subsidiary utility corporations." (R 1875)

The Examiner's Report.

On April 16, 1941, the trial examiner (John G. Clarkson), filed his Findings of Fact and Report, and recommended that the application be granted.

The examiner's Findings of Fact (R 1779), numbered 182 in all, are documented by references to the record, and cover every phase of the relations between Pacific Gas and North American, both in the past and at the time of the hearing.

The Examiner's Findings.

As stated by the Commission in its opinion (R 1912), the Commission does not dispute the examiner's findings, which are printed in full in the Record at pages 1779-1882. Consequently these findings may be considered as an undisputed statement of the facts of the case.

The trial examiner found,[1] among other things:

1. Pacific Gas is a California corporation. All of its properties are located in California, and its busi-

[1] References to the findings give the number of the finding and the page of the record at which it appears, thus (F 111, R 1844).

ness is carried on exclusively in that state (F 19, R 1791).

2. It represents the consolidation of over 400 separate companies, some of which were in operation as early as 1850 (F 13, R 1788).

3. Its office is in San Francisco, where all meetings of its stockholders, Directors, and Executive Committee have always been held and where its books and records are kept (F 34, R 1801).

4. All of the 15 present directors and officers (with the exception of two nominees of North American) are residents of San Francisco or vicinity; were either born in California or came there at an early age; have no substantial interest in any eastern company; and either own or represent substantial stock interests. Many were connected with predecessor companies. The fathers of four were active in the affairs of such predecessors. They are prominent in the community, know each other well, several since boyhood (F 38, 39, R 1807).

5. The Board is composed of intelligent men of initiative, independence and ability. All business is fully discussed. They would resent any outside interference and believe the company can "best be managed by Westerners for Westerners" (F 122-125, R 1851).

6. In 1925 North American entered California by acquiring the majority of the stock of Western Power which then controlled Great Western, a public utility

operating in California and which was in active competition with Pacific Gas (F 55-59, R 1816-17). From 1925 to 1930 North American supervised and controlled Great Western and its affiliated companies, charging substantial fees for such supervision (F 77, R 1827).

7. Pacific Gas as early as 1906 had desired to acquire Great Western, and had made approaches over the years (F 63, R 1819). By 1930 competitive conditions were such that the companies and the public recognized the resulting inefficiences and waste (F 59, R 1817).

8. In 1929, the President of Pacific Gas initiated negotiations to purchase Great Western (F 64, R 1819), which culminated in an agreement dated March 29, 1930. Under this Pacific Gas purchased North American holdings, and paid North American therefor 1,825,000 shares of its common stock[1] (F 69, R 1823).

9. During the negotiations, the President of Pacific Gas advised North American that it would not make the purchase if it would jeopardize its control by local directors. North American, through its representative, gave assurance that it did not desire to control Pacific Gas and would not increase its holdings or attempt to interfere with the management or policies of applicant, and would consider itself an investor only. It was only after these advices were communicated to

[1] Being 19.21% of its outstanding voting stock. North American had theretofore not owned any stock of Pacific Gas. (R 1821)

Pacific Gas Directors that the purchase was authorized, and it would not have been authorized without these assurances (F 66, 67, R 1821-2). It was agreed that North American would be accorded representation by three directors out of fifteen, this being the number it could elect by cumulative voting of its stock (F 86, R 1823).

10. The agreement and purchase were approved by the California Railroad Commission on May 14, 1930 (F 70, R 1824). Immediately thereafter the business and properties of Great Western and its affiliated companies were incorporated into those of Pacific Gas, all under direction of the General Manager of Pacific Gas without participation by North American in any decision as to personnel or otherwise. Concurrently, all indebtedness, contracts, procedures and relationships between Great Western and North American were cancelled and terminated (F 72-73, R 1825).

11. At no time before or since the 1930 purchase have there been any intercompany or other transactions of any kind whatsoever between Pacific Gas and North American.[1] More specifically—

[1] This should be contrasted with the supervision and control which North American exercised over Great Western, which included budgets, cash, rates, financial, inspection, representation on joint committees with other subsidiaries on rates, new business, station advisory and engineering, group purchasing and cash advances which at the time of the purchase exceeded $19,000,000. For supervisory services North American charged Great Western and its affiliates an average of $50,000 per year (F 77-82, R 1827-9).

12. Neither North American nor any of its affiliates or employees has ever performed any services with or without charge, for Pacific Gas (F 132, R 1855).

13. There have never been any intercompany loans or other financial transactions between Pacific Gas and North American (F 134, R 1855). All of the major acquisitions and construction projects of Pacific Gas have been and are decided upon, budgeted and carried out within its own organization and entirely independent of North American at all stages (F 135, R 1855). North American's organization has never assisted Pacific Gas in the preparation of any Registration Statement (F 136, R 1855).

14. Pacific Gas and North American do not employ the same accountants, attorneys, or engineers (F 138, R 1856).

15. North American has never recommended or suggested to Pacific Gas the employment of any person or been asked its views thereon (F 139, R 1856).

16. No employee of Pacific Gas, nor of North American or of its admitted subsidiaries has ever been loaned by either to the other (F 140, R 1856).

17. North American has never underwritten any securities issued by Pacific Gas, nor participated in any way in its financing (F 154, R 1868).

18. North American has never made any suggestions or recommendations, nor has it been asked its views, with respect to the dividend policy or the dec-

laration of dividends, with a single exception in 1933, when it asked that Pacific Gas reconsider its action in reducing the common dividend, which request was not acceded to (F 98, 99, R 1838).

19. North American has never had anything whatever to do with the accounting practices or rate, dividend, or other policies of Pacific Gas (F 144, R 1857, F 154, R 1868).

20. The banking connections, transfer agents, registrars and trustees of Pacific Gas are predominantly Californian, were all selected before North American became a stockholder and no important changes have been made since. North American has never acted as transfer agent, coupon paying agent, or registrar, nor has it performed fiscal services of any nature for Pacific Gas. Pacific Gas has not had occasion to borrow money from banks for over thirty years (F 130, R 1854).

21. Neither of the two North American directors of Pacific Gas at the time of the hearing had ever attended a directors' meeting, and one of them had never been in California (F 88, R 1832, F 102, R 1840).

22. At present and in the past communications and contacts between North American and its officers and Pacific Gas and its officers have been infrequent and unimportant (F 91, R 1834). The North American officers do not know any of the Pacific Gas officers with minor exceptions, save Mr. Black (F 100, R 1839).

23. The North American officers who are directors of Pacific Gas receive periodic reports, consisting of those submitted to the directors, and executive committee, a form of financial report sent to insurance companies, rate schedules and statistical reports. These convey less information than is received by the directors and members of the Executive Committee who attend meetings (F 94, R 1835).

24. James B. Black, President of Pacific Gas, was born in Illinois, brought to California at the age of 12, and has lived there ever since with the exception of the period from 1927 to 1935 when he resided in New York, and was a Vice-President of North American. He was educated in California, and graduated from the University of California in 1912. He entered the employ of Great Western in 1915, and rose through various positions until in 1922 he became Vice-President and General Manager. In February, 1927, at the invitation of North American, he went to New York as a Vice-President and remained there until 1935. His principal duties from 1927 to 1930, when Great Western was purchased by Pacific Gas, were to supervise Great Western's affairs. He was not a director of North American. After the sale of Great Western to Pacific Gas, he was elected as one of North American's directors on the Board of Pacific Gas and looked after North American's investment in that company. He came to California on an average of once a year (F 111-114, R 1844-1846).

25. On November 11, 1935, Mr. Hockenbeamer, President of Pacific Gas, died. On November 20, 1935, Mr. Black was elected as his successor. His selection was made on the initiative of C. O. G. Miller and other California directors, many of whom had known Mr. Black prior to 1927 when he was with Great Western, and a competitor of Pacific Gas. The fact that he was a Californian, familiar with some of Pacific Gas properties, and his experience and youth were deemed qualifications. He was recommended to Mr. Miller by a number of stockholders (F 115, R 1847).

26. The Directors had selected Mr. Black before North American knew anything about it, and his selection was a surprise to it and its officers were not enthusiastic about his leaving. The fact he was an officer of North American was not considered by Pacific Gas directors as a favorable factor, and he was chosen only after the directors had determined to their satisfaction that he would not be subject to influence by North American (F 115-16, R 1847). Mr. Black has not acted as a representative of North American nor has he been controlled or influenced by that company or any of its officers (F 119, R 1849). He has never received any requests or instructions from North American and it has never made any attempt to control or influence his action. He has never sought or received the advice, approval or recommendation of North American or any of its officers in any personnel, dividend, rate, salary, refinancing or other pending matters (F 120, R 1849).

27. North American has always given a proxy to vote its stock to the regular proxy committee named by Pacific Gas management. This committee has always consisted of the President, Vice-President and General Manager, and Treasurer. When North American became a stockholder in 1930, it owned 19.21% of the voting stock. By the time of the hearing (November 1940) it had progressively declined to 17.71%. During this period a majority of the outstanding stock would have been represented at only two of the stockholders' meetings if North American had not been represented, but if North American had not been represented or had withdrawn, a quorum could probably have been obtained by sending out an additional notice, as an attendance of 75% or more could have been and can be obtained by sending out a second notice (F 105-7, R 1841-3).

28. In 1933, the Pacific Gas directors voted to reduce the regular common stock dividend from 8% to 6%. Upon public announcement of the reduction, North American heard of it and requested the Board to reconsider its action, but it never did (F 144, R 1857). This is the only instance when North American attempted to influence the management or policy of Pacific Gas (F 145, R 1857).

29. Since its properties were purchased by Pacific Gas in 1930, North American has not attempted to exercise any control (F 156, R 1869). It could not if it attempted to and its attempts were resisted by local

directors, secure sufficient proxies to obtain a majority at a stockholders' meeting (F 127, R 1856). The maximum influence that North American can exert on the control, management or policies of Pacific Gas by virtue of its ownership of 17.71% of its stock, would be by cumulating its voting power. The maximum effect of its doing so at any meeting since it became a stockholder would be to enable it to elect four directors out of 15 (F 129, R 1853).

30. The directors and members of the Executive Committee of Pacific Gas attend with great regularity. No individual or group dominates the Board. There is free and full discussion in which all participate (F 35, 36, R 1802-3). No local director has ever observed anything that would indicate that the management or policies of Pacific Gas were subject to a controlling influence, directly or indirectly, by North American (F 126, R 1832).

31. Pacific Gas is regulated in all its phases by the California Railroad Commission which possesses the widest powers. Since 1912 all its securities (which include all those presently outstanding save 15% of its common stock) have been issued only on the permit of the California Commission which has also passed on all acquisitions, mergers, and exercise of franchises (F 159-167, R 1871-4). Present and prospective investors in Pacific Gas securities can obtain the information necessary to appraise its financial condition and earning power (F 171, R 1876). It keeps its accounts

in accordance with the uniform system of accounts. Its stock is listed on the New York and San Francisco stock exchanges, and in issuing securities it has filed registration statements required by the Securities Act of 1933 (F 172-6, R 1876). All its properties have been recorded on its books at cost (F 28, R 1798). Its annual appropriations for maintenance and depreciation aggregated 18.092% of its gross operating revenues for 1939 (F 29, R 1798). It originated the practice of sale of securities to customers and has sold large amounts of its stock to residents and consumers in its territory with resultant improvement in public and customer relations (F 33, R 1801).

32. The California Railroad Commission appeared at the hearing and filed a statement. This statement comments on the wisdom of the growth of Pacific Gas, particularly in its acquisition and consolidation of the properties of Great Western. The statement also declares that

> "Yet, as also stated in the beginning, we are aware of no instance during the course of this Commission's regulation of Pacific Gas and Electric Company when its management or policies appear to have been either controlled or influenced by North American Company. We may add that we perceive no public interest existing within the State of California, either for the protection of investors or consumers, which compels the conclusion that applicant, Pacific Gas and Electric Company, should be declared subject to the obligations and duties imposed by the federal Holding

Company Act upon subsidiary utility corporations." (F 170, R 1875)

After making these findings of fact the examiner concluded by recommending that the Commission should find and conclude—

> "4. That the management and policies of the Pacific Gas and Electric Company are not subject to the controlling influence, directly or indirectly, of the North American Company, wherefore it is not necessary or appropriate in the public interest and for the protection of investors or consumers, that the Pacific Gas and Electric Company be subject to obligations, duties and liabilities imposed by the Public Utility Holding Company Act of 1935;" (R 1880)

The Commission's Decision.

After the trial examiner made his report and recommendation, the Commission, on September 10, 1941, denied the application.[1] The basis of the Commission's decision is apparent from the following passages in its opinion (R 1883):

> "There is almost no dispute as to the facts in the case as they are set forth in the trial examiner's

[1] The application also prayed for an order pursuant to Section 3(a) of the Act exempting Pacific Gas from regulation under the Act as a holding company. This application was granted upon a finding that Pacific Gas is a California public utility company whose operations as such do not extend beyond the State of California (R 1911). The present proceeding does not involve this phase of the Commission's Order.

report and in the briefs of both counsel. The point of issue with respect to the application under Section 2(a) (8) is rather one of statutory interpretation and in this respect we cannot agree with the conclusions reached by the trial examiner." (R 1912)

The opinion also states that:

"We agree with the finding of the trial examiner that the record does not reveal any past attempts by North American to interfere affirmatively with the management or policies of PG&E." (R 1920)

Again the opinion says:

"But our decision herein is based primarily on our finding that North American has the power—if the occasion arises and if it so desires—to make its influence felt in a substantial and affirmative manner." (R 1922)

The opinion concluded with the following statement:

"The only question which we have decided is that, in the circumstance of this case where the statute presumptively requires that PG&E be regulated as a subsidiary of North American, the facts in the record before us do not demonstrate that PG&E is entitled to be excepted from the general requirement of regulation as a subsidiary of a registered holding company." (R 1931)

The Proceedings in the Court Below.

In the first decision of the court below, three judges sitting, Judge Haney, with Judge Stephens concurring,

it approved the Commission order (R 1699). Judge Garrecht dissented (R 1718).

The majority opinion, while saying that "a reasonable man could reach the conclusions the Commission reached and therefore the finding[1] must be sustained", finally turned upon the proposition that under clause (iii) of Section 2(a)(8), the Commission had uncontrolled discretion to subject a local utility (10% of whose stock was owned by a holding company) to regulation under the Act if it believed it was in the public interest to do so, irrespective of any evidence. The court reached this remarkable conclusion by construing Section 2(a)(8) as containing four conditions instead of three, the fourth condition being termed the "necessity clause", which, being independent of the control or controlling influence clauses, authorized the Commission to dismiss an application if it believed that it was in the public interest to hold the local utility subject to regulation under the Act.

A rehearing before the entire court, then consisting of seven judges, was granted (R 1739). On rehearing the court affirmed the order of the Commission, by an equally divided court, Judge Haney having died in the interim.

The court below entered its order without any expression other than that its action was "by an evenly divided court" (R 1741).

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[1] The "finding" was only that Pacific Gas had not *demonstrated* the absence of controlling influence or the future possibility of any influence.

Judge Garrecht, however, filed a dissenting opinion from the judgment affirming the Commission's order, in which dissent Judge Mathews joined (R 1714). This dissenting opinion contains an extensive analysis of the record before the Commission, and finds that there was no substantial evidence of the existence of a controlling influence by North American over Pacific Gas; that the Commission's findings rested on speculation and conjecture as to whether North American might acquire a controlling influence in the future; and that the Commission misinterpreted the Act by holding that susceptibility to future influence is the equivalent of the controlling influence required by the Act.

ERRORS RELIED ON

1. The Commission misconstrued and misapplied the Act in several particulars:

(a) It held that Pacific Gas is a subsidiary of North American irrespective of whether in fact it is subject to North American's controlling influence.

(b) It misapprehended the statutory test of a subsidiary, holding that the Act makes absence of controlling influence a mere statutory exception to the primary intention of subjecting to federal regulation all local public utilities of whose voting stock 10% or more is owned by a holding company.

(c) It held that the mere speculative possibility of future "substantial" influence authorizes regulation under the Act.

(d) It held that the Act imposed on Pacific Gas the virtually impossible burden of "demonstrating" a negative, namely, absence of control and controlling influence.

(e) It gave no effect to the requirement that influence, to authorize regulation under the Act, must be "controlling" influence.

2. There is no substantial evidence of the existence of a controlling influence of North American over Pacific Gas. The Commission's order is based on suspicion and conjecture, and is not supported by substantial evidence.

3. The court below did not give the review of the Commission order contemplated by the Act.

I.

THE COMMISSION MISCONSTRUED AND MISAPPLIED THE ACT

The Commission, after stating that

> "There is almost no dispute as to the facts in the case as they are set forth in the trial examiner's report and in the briefs of both counsel. The point of issue with respect to the application under Section 2(a) (8) is rather one of statutory interpretation and in this respect we cannot agree with the conclusions reached by the trial examiner." (R 1912),

then proceeded to expound its view of the law and, as we submit, misconstrued and misapplied the Act in several particulars, which are now discussed.

The Commission Misapprehended the Statutory Test of a Subsidiary.

In unmistakable language, the Commission held that the primary intent of the Congress, as expressed in Section 2(a)(8), is that all local public utilities 10% or more of whose voting stock is owned by a holding company shall be subjected to federal regulation.

It held that since North American owns more than 10% of the voting stock of Pacific Gas, "the statute presumptively requires that PG&E be regulated as a subsidiary of North American"; and having found that petitioner "has not demonstrated that its management and policies are not subject to the controlling influence of North American" (R 1930), concluded that petitioner had failed to "demonstrate that PG&E is entitled to be excepted from the general requirement of regulation as a subsidiary of a registered holding company" (R 1931).

Unequivocally therefore, the Commission held that the Act makes absence of controlling influence a mere statutory exception to the primary intention of subjecting to federal regulation all local public utilities of whose voting stock 10% or more is owned by a holding company.

The Statutory Test of a Subsidiary Is Controlling Influence, Not Stock Ownership.

The Commission, we submit, thus replaced form with substance, and substance with form. The whole tenor of the Act, its history, the debates in Congress, and

the construction urged upon this Court in defense of its constitutionality, all show the substantive intent of the Act to be that only local utilities controlled by, or subject to the controlling influence of, interstate holding companies are subjected to regulation as subsidiaries; and that local utilities not so controlled are excluded. The test laid down was the existence as a fact of control or controlling influence over the local utility by the holding company, and not the percentage of stock owned.

The procedure provided by both Section 2(a)(7) and Section 2(a)(8) of the Act shows that its purpose is to include within the ambit of the Act only those local utilities subject to the control or controlling influence of holding companies and to exclude those which are not, and that stock ownership is utilized simply to provide practical machinery for initiating proceedings to determine which of all the public utilities in the country are to be regulated under the Act, and which are not.

Senator Wheeler, in charge of the bill, pointed this out during the debates, when he said (79 Congr. Rec. 6397):

> "This is only prima facie evidence; but even if they hold 40 per cent of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company, and the Commission is directed to make a finding and to exempt them if they are not actually controlling the company as the word 'control' is defined in the bill."

See also Senator Wheeler's remarks at 79 Congr. Rec. p. 8439, where he said:

> "The mere ownership of the 10 per cent of the stock does not of itself make him a holding company, because unless he actually controls the company he is not a holding company."

Still further corroboration of the foregoing is found in a *"Memorandum in Support of Constitutionality of the Public Utility Holding Company Bill"*, frequently referred to in the Congressional debates, which was prepared by sponsors of the bill, and commended to attention by Senator Wheeler, who had it printed in full in the Congressional Record so that it might be readily available (See his remarks, 79 Congr. Rec. 8402).

This Memorandum, after stating the grounds for sustaining federal regulation of interstate holding companies, continues as follows (79 Congr. Rec. 8406):

> "The claim may be made that the Regulations go beyond their stated purpose [as stated in Section 1 of the Act] because many of them are directed against the subsidiary companies of registered holding companies. The point is without merit. . . . Regulation of actions of companies controlled by those under the jurisdiction of Congress —those whose policies are determined completely by the registered holding company—is merely a means of applying and making effective the basic authority which the bill asserts over the registered holding company."

And again the Memorandum says:

> "The case for regulation of transactions between the holding company and its subsidiary companies is equally clear. These transactions are not contracts freely made at arm's length, but the decisions of the holding company itself sitting through its representatives on both sides of the table." (79 Cong. Rec. 8407)

The foregoing cannot be more succinctly stated, nor the rationale of the Act more clearly expounded, than in the following passage quoted from page 195 of the brief of the Commission in this Court in the *Electric Bond & Share case* (303 U.S. 419), in which case the Act was held constitutional.[1] While the discussion there refers to "control" from the standpoint of the holding company, the statutory provision with respect to "control" from the standpoint of the subsidiary is similar, and the discussion is equally applicable:

> "The bill as originally introduced defined a holding company as a company which directly or indirectly controls a public-utility company. As thus drafted the bill would have made it necessary for a company to determine for itself and at its own risk whether it had such a controlling authority over a utility company as to constitute it a holding company. Had this provision not been

[1] This brief is signed by Homer Cummings, Attorney General, Allen E. Throop, General Counsel, Securities and Exchange Commission, Robert H. Jackson, then Assistant Attorney General, and by Benjamin V. Cohen and Thomas G. Corcoran, Special Assistants to the Attorney General and recognized draftsmen of the bill.

changed or had it taken the slightly modified form suggested by the Committee of Public Utility Executives, holding companies would have had to guide their own action on the basis of a standard no more definite than that given to the Commission to guide its administrative determinations. Anyone familiar with modern corporate affairs knows the practical difficulties involved in determining the existence or non-existence of corporate control, one of the most elusive problems in corporate finance. There is no single, inflexible rule (whether it be stock ownership, interlocking directorates, or interlocking banking arrangements) that will give the correct solution in all cases.

* * * * * * *

"The standard of 'control' was known to be susceptible of judicial and quasi-judicial determination. It had been adopted by the courts themselves in some of the Sherman Act cases. *United States v. Union Pacific R. Co.*, 226 U.S. 61. The Congress, however, found it impracticable to put upon the Commission the burden of making the initial specific determination of control for each and every holding company before that company could be deemed a holding company and required to register. Not only would such procedure have been too cumbersome and dilatory to be effective, but it would have placed the burden of proof upon the Commission to ferret out elusive and subtle facts peculiarly within the knowledge of each company, an almost impossible task.

"The Congress selected the element of stock ownership, the factor most usually indicative of control, as *prima facie* evidence of control. And in the same provision the Congress set up the ma-

chinery for rebutting this presumption so that a company may readily prove, if such be the fact, that it does not possess control. Such burden of proof is not onerous, because every company has completely within its own organization full knowledge and control of all the facts and evidence. And the Act provides that upon the mere filing in good faith of an application for exemption the company shall automatically be exempted until the Commission acts upon the application. Judicial review is provided to guard against any arbitrary action on the part of the Commission and to afford a remedy should the Commission's findings of fact be not supported by substantial evidence (Section 24(a)). No more careful and painstaking effort to meet every legal and practical requirement involved in this difficult and complicated situation could have been made by a legislative body.'"[1]

The statutory scheme, therefore, amounts to this:

1. A local utility is subject to the Act only if it is part of a holding company system by reason of being subject to the controlling influence of such holding company.

2. The local utility is presumed to be subject to the controlling influence of a holding company and hence subject to the Act, if 10% or more of its stock is owned by such a holding company, unless the Commission finds it is not subject to such controlling influence.

[1] See Senate Committee Report on the Bill (74th Congress, First Session, Report 621, page 5); also *Electric Bond & Share Co. v. S.E.C.* (C.C.A.2d), 92 F.2d 580, 592.

3. It is made the duty of the Commission to find that the local utility is not subject to the controlling influence of the holding company (and hence not subject to the Act), upon application of the local utility and upon a showing of that fact by the local utility, and pending hearing and decision the local utility (whether it is finally found to be controlled or not) is not subject to the Act.

The Commission in acting upon such application of a local utility acts in a judicial capacity. The proceeding is, in substance, one for a declaratory judgment, and the Commission exercises no discretionary or administrative powers in determining whether a local utility is in fact controlled or subject to a controlling influence. It is a fact finder. The application is not one for exemption from the Act but for a declaration that the local company is not subject to the Act.

At Most, the Act Raises a Rebuttable Presumption of Control from Stock Ownership.

The fact that holding companies and others frequently exercise a controlling influence with less than majority holdings will not support a conclusive inference that such influence results from definitely minority ownership in a particular case. Since such stock ownership is entirely consistent with lack of control in an infinite variety of situations, a conclusive presumption of control from mere ownership of 10% or less than a majority of a corporation's stock would be arbitrary, and void. See *Tot v. United States,* 319 U.S. 463, 467, and cases there cited.

Nor did Congress intend that 10% stock ownership shall of itself be substantial evidence of controlling influence, for that would make meaningless the provisions for judicial review. No case can arise under Section 2(a)(8) unless 10% stock ownership is present; and it was not intended that the fact giving rise to the inquiry would preclude the judicial review provided to determine whether the order is "supported by substantial evidence". (Sec. 24(a))

Certainly, the most that was intended by Congress was that such stock ownership should raise a rebuttable presumption, for the purpose of simplifying the determination of which public utilities are subject to the control or controlling influence of interstate holding companies and are therefore intended to be subjected to federal regulation as their subsidiaries. Ownership of 10% of a local utility's stock has significance only as marking the point where the utility is placed under the duty of initiating proceedings for a determination of status. Once the utility has filed its application it is exempted from the Act until decision thereon is made, and it is entitled to a hearing at which evidence may be introduced. The Commission is placed under the duty of weighing that evidence and deciding in accordance therewith. Once a hearing is had and the utility makes a full disclosure of the facts the significance of the duty of going forward, initially placed upon it, disappears from the case.

The rule with respect to presumptions has been frequently announced by this Court, namely, that they are

not evidence, and cannot be weighed as evidence, but simply require the production of contrary evidence; and when that is done, disappear from the case. *New York Life Ins. Co. v. Gamer,* 303 U.S. 161; *Tot v. United States,* 319 U.S. 463; *Commercial Corp. v. New York Barge Corp.,* 314 U.S. 104.

This view of the effect of the presumption was correctly taken by the court below in its first decision when it held that, while under the Act it was the duty of the applicant to go forward with the evidence,

> "When the evidence is all in, the Commission considers the whole body of evidence, both pro and con, and finds what the ultimate facts are unrestrained by any rule regarding the burden of proof, as used in the first sense." (i.e. the duty to prove a charge by a degree of proof such as a preponderance of the evidence) (R 1707)

See *Anniston Mfg. Co. v. Davis,* 301 U.S. 337, 352.

In view of the trial examiner's findings, it is impossible to doubt that in the present case the evidence of Pacific Gas rebutted any presumption of controlling influence raised by North American's ownership of stock, such presumption therefore ceasing to be a factor in the case.

Consequently, it was error for the Commission to rest its decision on the ground that since North American owns more than 10% of petitioner's stock, "the statute presumptively requires that PG&E be regulated as a subsidiary of North American" (R 1931).

The Commission Imposed the Almost Impossible Burden of "Demonstrating" a Negative.

Having held that petitioner was under the burden of proving that it fell within a statutory exception, it was natural for the Commission to hold, and to state three times, that to prevail, petitioner must "demonstrate" the absence of controlling influence (R 1912, 1930, 1931). The Commission left no doubt of its meaning, declaring that in cases such as this,

> "the applicant must show that nothing . . . would suffice to make its management or policies 'subject to a controlling influence' "[1]

of the holding company (R 1914).

Thus the Commission invoked and applied the familiar rule that statutory exceptions are to be narrowly construed and that one who seeks the advantage of such an exception must show by more than the usual degree of proof that he falls within it: *Javierre v. Central Altagracia,* 217 U.S. 502; *Schlemmer v. Buffalo Ry. Co.,* 205 U.S. 1, 10; *Ryan v. Carter,* 93 U.S. 78; *United States v. Cook,* 17 Wall. 168; *United States v. Dickson,* 15 Pet. 141, 165; *United States v. Scharton,* 285 U.S. 518, 521.

Since an adequate showing that a company is not a subsidiary would in many cases fail to meet the test thus adopted and applied by the Commission, its misconstruction of the statute in this regard was preju-

[1] This statement appears in the Commission's decision where it is quoted with approval from its decision in the Hartford Case, 8 S.E.C. 758.

dicial. See *McCandless v. United States,* 298 U.S. 342, and cases cited.

There is no doubt that the Commission used the word "demonstrate" in its usual sense when it stated, at three points in its opinion, that petitioner must demonstrate that it is not subject to the controlling influence of North American (R 1912, 1930, 1931).

The Commission said:

> "First, it is clear that the application herein cannot be granted unless we can find that applicant has sustained the burden of *demonstrating* that its management and policies are not subject to the controlling influence of North American" (R 1912)
>
> "* * * we hold that applicant has not *demonstrated* that its management and policies are not subject to the controlling influence of North American * * *" (R 1930)
>
> "* * * the facts in the record before us do not *demonstrate* that PG&E is entitled to be excepted from the general requirement of regulation as a subsidiary of a registered holding company" (R 1931).

Even affirmative proof is seldom required to be proof to a demonstration. "Demonstration is that which excludes possibility of error" (*Boetgen v. N.Y. & H.R. Co.,* 50 N.Y.S. 331, 332). It is defined in 23 C.J. 9, as follows:

> "Demonstration is such a degree of proof as, excluding possibility of error, produces absolute cer-

tainty, and has been said to be presented only in mathematical deductions."

In *Jones on Evidence* (3d ed.), Sec. 5, it is said:

> "In judicial procedure the issues are so framed that it is hardly possible to establish with absolute certainty the truth of the propositions involved; hence in courts of justice parties are compelled to rely not upon demonstrative but upon moral evidence, 'by which is meant not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained either from intuition or from demonstration.'"

Such degree of proof is rarely attainable and, as was said in *Baltimore etc. R. Co. v. United States,* 298 U.S. 349, 378:

> "Many issues as to which demonstrable accuracy is impossible have to be decided by the courts. In ascertaining cost of transportation of one out of many commodities hauled by railroads it is impossible to attain precision. Mere lack of it is not ground for objection either to the evidence offered or the facts which it tends to prove."

The Act sets up no such degree of proof. Neither its sponsors, as noted from their explanation of the bill (supra, p. 27), nor those who argued in its favor in Congress, took such a view of its requirements. Counsel who successfully argued in the Supreme Court in support of the constitutionality of the Act, referred

to the presumption as one "which might be rebutted",[1] as one under which a company may "readily prove absence of control",[2] as one which "can readily be rebutted . . . upon a showing that the company does not in fact exercise control".[3]

Even in ordinary civil cases it has been held error to require that the evidence amount to "convincing proof" (*New York Life Ins. Co. v. Gamer,* 303 U.S. 161; *Murphy v. Waterhouse,* 113 Cal. 467, 473; *People v. Miller,* 171 Cal. 649, 652).

But in this case the Commission required even more; petitioner was "called on to prove a negative against an all-embracing, sweeping conclusion" (*Leonard v. Lead Co.,* C.C.A. 8th, 75 F. 2d 390, 397).

The authorities recognize the great difficulty of proving a negative, and hold that less than the usual degree of proof should be accepted as sufficient. No court so far as we know has ever announced or applied the virtually impossible burden of "demonstrating" a negative.

All that is required of parties subject to the burden of proof is to produce proof sufficient to show that the negative fact or circumstance is probable. 20 *Am. Jur.* 1099; 23 C.J. 27; *Jones on Evidence* (3d Ed.) Sec. 178; *Prentice v. Crane,* 234 Ill. 302.

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[1] P. 188 of brief for SEC in *Electric Bond & Share* case.

[2] P. 197 of said brief.

[3] P. 6 of Appendix A to said brief.

The Commission Held That the Statutory Test of an Existing "Controlling Influence" Is Satisfied by a Finding That Purely Hypothetical Future Machinations Might Produce a Controlling Influence.

Section 2(a)(8) requires the Commission to declare applicant not to be a subsidiary if it finds that it "is" not controlled, and that its management or policies "are" not subject to a controlling influence. The statute speaks in the present tense; the determination is to be based on the facts existing at the date of the inquiry.

It is not necessary for us to contend, as the Commission has frequently suggested that we do, that the "controlling influence" must be exercised in order to meet the statutory requirement.[1] For the purpose of this argument, we may assume that the present existence of the power, whether or not in the process of being exercised, is sufficient. That is to say—it may be sufficient if the power exists though quiescent. The power, however, must presently exist and must be strong enough to be "controlling" if exercised—not something less than controlling.

That the "controlling influence" spoken of is intended to be presently existing is further shown by

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[1]Under Sec. 2(a)(7) of the Act, a stockholder is not a holding company if the Commission finds it "does not * * * exercise * * * a controlling influence over the management or policies of any public utility." It would appear logically to follow, that the utility likewise is not a subsidiary unless in fact a controlling influence is exercised over it by a holding company.

elaborate provisions in the same section of the Act, whereby the Commission may insure that a company declared not to be a subsidiary will be promptly brought under regulation if one of the conditions prescribed in the Act arises later. Thus, Section 2(a)(8) authorizes the Commission (Appendix p. 7):

1. To make its order (declaring the applicant not a subsidiary) conditional upon the applicant's applying periodically for a renewal of the order;

2. To require an applicant declared not to be a subsidiary to file such periodic reports as the Commission may deem appropriate, regarding the intercorporate relationships of the applicant, so as

> "to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective";

3. To revoke its order declaring the company not a subsidiary whenever it determines that "any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company";

4. To modify its order whenever deemed necessary "to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective."

These provisions plainly evidence Congressional intent that any particular public utility shall not be subject to the obligations of the Act unless a con-

trolling influence is presently in existence, and also intent to require that the Commission shall grant a declaration, in a case such as this, where all that it found was a purely speculative possibility that a controlling influence might come into existence at some future time. Indeed the Commission did not characterize the possible future influence as "controlling" but only as "substantial and affirmative." (R 1923)

A prediction of possible future influence, unsupported by any past or present exercise of, or even attempt to exercise, influence was not intended by the Congress to subject local utilities to federal regulation.

The Commission here expressly refrains from finding that petitioner is presently subject to the controlling influence of North American. Having interpreted the phrase "subject to a controlling influence" as including "susceptibility to domination" (R 1913-1914), the Commission stated:

> "There is evidence [which the Commission does not identify] to justify a finding that even at the present time North American exerts a real influence in the affairs of PG&E, even though this influence is exerted in a negative way. But our decision herein is based primarily on our finding that North American has the power—if the occasion arises and if it so desires—to make its influence felt in a substantial and affirmative manner." (R 1922-1923)

Thus the Commission not only fails to find, it does not even predict, that North American will be able to exer-

cise a "controlling" influence over the management or policies of petitioner.

The studied avoidance by the Commission of a finding of the existence of a controlling influence, constitutes, under the circumstances, a startling admission by it that the evidence was not sufficient to support a finding that a controlling influence actually existed.[1]

Later, the Commission says that in a proxy fight (none has ever occurred and nothing is suggested as a basis for supposing that one ever will occur), "North American's holdings would make it a formidable opponent"; and that the possibility that it might win such a proxy fight[2] "would, in itself, be a potent tool

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[1]This case illustrates the wisdom of the rule frequently announced that where a determination of status imposes burdensome statutory obligations, the facts which furnish the basis for the determination must be affirmatively found. *Panama Ref. Co. v. Ryan,* 293 U.S. 388, 431; *United States v. Baltimore & Ohio R. Co.,* 293 U.S. 454, 458, 462; *United States v. Carolina Carriers Corp.,* 315 U.S. 475, 489; *Florida v. United States,* 282 U.S. 194, 211; *Yonkers v. United States,* 320 U.S. 685, 691.

[2]All the witnesses testified and the trial examiner found that North American could not win a proxy fight. (F 127, R 1853.) The existence of the Public Utility Holding Company Act, and the regulation requiring commission approval before a holding company can even solicit proxies, makes the suggestion that North American could win a proxy fight against the California directors appear fantastic. Events since the hearing make such a possibility even more absurd. North American has already disposed of more than a quarter of its holdings of Pacific Gas stock and as stated by counsel for respondent "has committed itself to a program of systematic disposition" of the remainder.

in influencing the management to give heed to North American's wishes". The Commission's view of what the statute requires is further shown by its holding that:

> "To satisfy condition (iii) the applicant must show that nothing in the course of relationships between the specified holding company and itself would suffice to make its management or policies 'subject to a controlling influence, directly or indirectly by such holding company' . . ." (R 1914)

Unequivocally, therefore, the Commission construes the statute to require an applicant to show not only that it is not presently subject to the controlling influence of a holding company, but to show in addition that a controlling influence could not arise in the future—an impossible task.

We submit that the very purpose of the detailed provisions just described, for retention of jurisdiction by the Commission after granting an application under Section 2(a)(8), was to eliminate all occasion for (and by implication to forbid) regulation of a public utility where at the time of the inquiry, the holding company did not possess the power to control or to exert a controlling influence.

The foregoing is well expressed in Judge Garrecht's dissenting opinion in which Judge Mathews joined. As Judge Garrecht points out—

> "The Commission admits that the record does not reveal any past attempt by North American to interfere with its management or policies. It is

likewise conceded that there is no evidence of actual control, nor, as has been shown, is there any substantial evidence from which any legally sound inference can be drawn that there ever was any effort whatsover by North American to subject appellant to any controlling influence." (R 1768)

Judge Garrecht then refers to the express provisions of Section 2(a)(8) whereby the Commission, after declaring a company not to be a subsidiary, may require periodical reports, and may revoke or modify its order at any time on its own motion.

His opinion continues as follows:

"These provisions indicate that the Congress intended to cover a situation where there might be some 'susceptibility' of such influence in the future but where none presently existed and that it did not intend that a declaration should be withheld in the absence of present active controlling influence.

"From the discussion in Congress at the time the Act was under consideration and as well from the fair and ordinary meaning of the language, the phrase 'subject to a controlling influence' does not mean, as the Commission found, that appellant was required to 'demonstrate' that its management and policies were not 'susceptible to control' by North American. 'Subject to a controlling influence' is not the equivalent of 'susceptible to a controlling influence'. 'Susceptible' and 'subject' are not interchangeable or synonymous terms. The word 'susceptible' connotes an especial liability to mental and emotional impressions. Advisedly that expression was not used in the statute. But the

word 'subject' is used, and here it occurs in relation with 'control', and in that sense it must correctly be continued [construed] as meaning under the power or dominion of another. It is synonymous with subordinate, inferior, 'To control' means to exercise a restraining or direct influence over; to dominate; regulate; hence to hold from action; to curb; to subject. Moreover, 'controlling' means the act or fact of exercising restraining influence over, which conveys the idea of a continuing process. Thus, 'subject to a controlling influence', as stated in the statute, is not the same thing as 'susceptibility' to a controlling influence as expressed by the Commission. One phrase refers to an actually existing state; the other might be applied to some future condition which uncertain events might possibly bring about. In considering this aspect of the matter it is important to keep in mind that under the statute as above noted the Commission is in a position to act at once if ever the susceptibility should become an actuality, even if the Commission had theretofore granted petitioner an exemption at a time when the facts showed a lack of any actual and existing control or controlling influence.

"It is also clear that the vague, artificial tests here employed are not sanctioned by the Act. Nor was it expected that inferences based upon inferences, or suppositions, or even possibilities, would be substituted for substantial evidence." (R 1769-71)

The Commission Construed and Applied "Controlling Influence" as Meaning "Influence" Only.

In an article analyzing the Commission's opinions in "controlling influence" cases, the author says:

> "In the opinion of the writer the term 'controlling influence' has been consistently interpreted by the Commission to mean 'influence' only. Certainly the word 'controlling' has not been given its ordinary significance." (40 Univ. of Mich. L. Rev., 274, 284.)

Plainly, we submit, the Commission ignored the word "controlling" in the present case. Later we show that the writer of the Commission's opinion marshaled every faintest suggestion in the record which could be advanced to give any support to the result reached, and ignored or slighted all evidence to the contrary, going so far, indeed, as to lead two of the judges in the court below to deem it necessary and appropriate to characterize the opinion as exceeding the bounds of fair and neutral analysis governing quasi-judicial deliberations, saying "To reach the conclusion arrived at by the Commission every circumstance is viewed with a hostile eye and every instance tortured into some semblance of sinister purpose" (R 1758)

But, notwithstanding its zeal, the opinion does not go so far as to find that the management or policies of petitioner are, or ever were, subject to a controlling influence of North American. It goes no further than to say that "North American has the power—if the occa-

sion arises and if it so desires—to make its influence felt in a substantial and affirmative manner" (R 1922).

This statement is to be read in light of the fact that the Commission admits the entire absence of intercorporate dealings in the past (R 1910), admits that there have been no attempts[1] by North American to influence the management or policies of petitioner (R 1920), and makes no attempt to suggest that there is any ground for supposing that intercorporate dealings or attempts to exercise influence are likely to occur in the future.

The Commission's finding, in short, is not, and does not pretend to be, anything more than a purely hypothetical prediction that if at some future time occasion should arise (although none has ever arisen in the past), North American could exercise a degree of influence in petitioner's affairs which it would then be proper to characterize as "substantial".

That the use of the word "controlling" in the Act was deliberately intended to exclude jurisdiction over public utilities subject to a degree of influence less than controlling, is shown by the fact that the test prescribed in the bill as originally introduced was "material" influence, which was later changed to "controlling" influence (H.R. 5423, 74th Congr. 1st Sess., 1935, p. 7; S. 1725, 74th Congr., 1st Sess., 1935 pp. 7-8).

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[1]Except one wholly ineffectual attempt to induce the directors to reconsider a dividend reduction, discussed above, p. 18, and below, p. 74.

The Commission's inclusion under the Act of local utilities merely subject to the possibility of substantial future influence is to be contrasted with the assurances given to Congress by the sponsors of the Act, that regulation of "subsidiaries" was within the powers of the Congress, and was appropriate, because the "subsidiaries" referred to were "those whose policies are determined completely by the registered holding company", and that the transactions between parent and "subsidiary" to be regulated under the Act were "decisions of the holding company itself sitting, through its representatives, on both sides of the table" (supra, p. 29).

In this respect, therefore, the Commission violated the frequently announced principle governing interpretation of such statutes that Congressional intent to invade the traditional domain of the States is never assumed unless, and except so far as, its intention to do so is clearly expressed. *Illinois Central R. Co. v. Commission,* 245 U.S. 493, 510; *Palmer v. Massachusetts,* 308 U.S. 79, 84; *Fed. Trade Comm. v. Bunte Bros.,* 312 U.S. 349, 354; *City of Yonkers v. United States,* 320 U.S. 685, 690; *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 153.

We submit that the Commission's virtual elimination from the Act of the word "controlling" requires, without more, that its order herein be set aside, since plainly it cannot be said that the Commission would have found that absence of controlling influence had not been shown had it not been for the Commission's

view that the influence spoken of in the Act need not be controlling influence.

The "Controlling Influence" Must Be Sufficiently Powerful to Bring About the Evils Condemned by the Act.

The quantum of controlling influence over the management or policies of the local utility which is necessary to fulfill the requirements of the section, is obviously such controlling influence as will enable the holding company so to influence the management or policies of the public utility as to permit it to bring about the evils which are condemned by the Act and which it was enacted to prevent.

Section 1(c) of the Act declares it to be the policy of the Act "in accordance with which policy all of the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section."

The examiner found specifically that none of the facts or conditions enumerated as evils in the Act, exist with respect to Pacific Gas (supra, pp. 14, 19).

There is a total absence of any evidence in the record, and the Commission makes no attempt to find, that North American possesses such a measure of influence over the management or policies of Pacific Gas as would enable it to bring into existence any of the evils condemned by the Act, or calling for the subjection of Pacific Gas to the Act in order to "meet the problems" or "eliminate the evils as enumerated in this section" (Section 1c).

The Commission in an earlier proceeding involving Section 2(a)(8) (*Manchester Gas Company,* 7 S.E.C. 57, 62) recognized that a controlling influence must be such as to bring about the evils at which the Act is directed, saying:

> "If the 'controlling influence' is sufficiently extensive to embrace the power to bring about the evils that the Act is designed to guard against, the statutory standard under Section 2(a) (8) is satisfied."

Assuming for the purpose of the argument that no showing need be made of the present existence of the evils, there still must be some substantial evidence before the Commission that there is such a controlling influence as would enable the holding company to bring about the evils enumerated in the Act. There is no such showing in this case.

In view of the express statutory provisions as to what affects the public interest, and the failure of the Commission to find that any of the enumerated statutory evils exist or can be brought about by any influence of North American, we submit the Commission's denial of the declaration upon the ground that Pacific Gas had not "demonstrated" that granting it would not be adverse to the public interest, was founded upon a misconstruction and misapplication of the Act, was not supported by substantial evidence, and was, therefore, arbitrary and without authority of law.

II.

THE COMMISSION'S ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND IS CONTRARY TO ALL THE EVIDENCE.

That the order of the Commission was arbitrary and not supported by any substantial evidence is clearly demonstrated in Judge Garrecht's dissenting opinion in which Judge Mathews joined. The opinion is printed at page 1741 (Vol. V) of the record, and we ask particularly that it be read.

Judge Garrecht described the Commission's treatment of the evidence thus:

> "We call attention to the fact that the findings and conclusions of the Commission are based on inference and surmise in many instances in absolute conflict with the testimony which was uncontradicted and not discredited." (R 1747)
>
> "To reach the conclusion arrived at by the Commission every circumstance is viewed with a hostile eye and every instance tortured into some semblance of sinister purpose." (R 1758)
>
> "There are other instances where the Commission very frankly has interpreted the testimony of the witnesses contrary to their evidence. These interpretations, which are exaggerated into some semblance of an argument, are then designated as inferences of the Commission as to 'events which might happen' but 'not what actually happened'." (R 1761)
>
> "It is also clear that the vague, artificial tests here employed are not sanctioned by the Act. Nor was it expected that inferences based upon in-

ferences, or suppositions, or even possibilities, would be substituted for substantial evidence." (R 1771)

"To sustain the Commission on the record here would require us to hold, as the court did on the first hearing, that its determination of what is necessary in the public interest is a matter within the uncontrolled discretion of the Commission. This is not the proper interpretation of the statute and counsel representing the Commission do not so contend." (R 1775)

The Act Provides for Full Judicial Review.

Section 24(a) of the Act provides that any party aggrieved by an order of the Commission may obtain review thereof in the Circuit Courts of Appeals. (Appendix, p. 13)

The scope of review provided for is complete; the court has the power, and therefore the duty when appropriate, to stay the order pending review and to direct the Commission to receive additional evidence "in such manner and upon such terms and conditions as to the court may seem appropriate". The court must determine whether the findings of fact are supported by substantial evidence; and may "affirm, modify or set aside such order, in whole or in part."

As presently shown, the court has the power and duty of examining the whole record and ascertaining for itself whether there are material facts not reported by the Commission. It may either return the case to the Commission, with directions to make additional

findings, or if satisfied that the facts are clear, may modify or set aside the Commission's order and finally dispose of the matter.

The provisions for judicial review follow closely those in Section 5 of the Federal Trade Commission Act, the scope and effect of which were well settled when the Holding Company Act was enacted.

In *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568, 580, this Court said:

> "Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission —the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act."

This passage was quoted with approval in *Internat. Shoe Co. v. Federal Trade Commission*, 280 U.S. 291,

297. See also *Ford Motor Co. v. Labor Board,* 305 U.S. 364.

Fair Consideration of the Evidence Is Essential to Due Process of Law.

This Court has repeatedly declared that decisions like that of the Commission in the present case must be based upon a fair and neutral examination of the evidence.

In *Ohio Bell Tel. Co. v. Commission,* 301 U.S. 292, 304, Mr. Justice Cardozo said, speaking for the Court:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. * * * Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity. * * * The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co. v. Polt,* 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. * * * There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In the *Chicago Junction* case, 264 U.S. 258, 265, Mr. Justice Brandeis said:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

Again, in *Morgan v. United States,* 298 U.S. 468, 480, the Court, speaking through Chief Justice Hughes, said:

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action."

The scope of review of administrative orders for procedural errors is summarized in the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 74, as follows:

> "Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State. It may set aside an order for lack of findings necessary to support it, or be-

cause findings were made without evidence to support them; or because the evidence was such 'that it was impossible for a fair-minded board to come to the result which was reached', or because the order was based on evidence not legally cognizable; or because facts and circumstances which ought to have been considered were excluded from consideration; or because facts and circumstances were considered which could not legally influence the conclusion; or because it applied a rule thought wrong for determining the value of the property." (Cases cited are omitted)

The Commission Ignored or Slighted the Mass of Direct Evidence Showing Absence of Control, and Based Its Decision on Speculative Inferences.

As presently shown, the Commission's decision is based entirely on highly speculative inferences contrary to direct and persuasive evidence. These inferences, moreover, are reached by marshaling every slightest circumstance that can even plausibly be brought forward for the purpose, and then seeking to draw inferences therefrom almost completely without reference to the mass of direct evidence which shows, as we submit, that no inference of the existence of controlling influence can be drawn.

No weight whatever is given to the fact that no act in the past of either North American or Pacific Gas even suggests the existence of influence over petitioner, whether controlling or other.

This treatment of the evidence violates well settled principles. As this Court said in *West Ohio Gas Co.*

v. Commission, 294 U.S. 79, 81, to ignore the experience of the past in favor of a contrary prediction of the future "is as much arbitrary action as to build a schedule upon guesswork with evidence available".

We show, moreover, that even considered alone, the facts upon which the Commission rests its inferences are entirely consistent with the lack of controlling influence, which lack is shown by direct evidence which the Commission depreciates or ignores entirely. In appraising circumstantial evidence, "the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference". (*Home Ins. Co. v. Ry. Co.,* 18 Wash. 2d 798; cases in accord, 32 C.J.S. 1101.)

A fact cannot be established by inference from circumstances which are consistent with direct and unimpeached evidence that the fact does not exist (*Penn. R. Co. v. Chamberlain,* 288 U.S. 333, 339; cases collected, 23 C.J. 50; 32 C.J.S. 1102).

The Findings and Conclusions of the Examiner That No Controlling Influence Exists, Are of Substantial Significance.

The trial examiner heard all the testimony and observed the demeanor of the witnesses;[1] the Commission, on the other hand, considered and decided the case merely on the basis of the record and the arguments of counsel. The examiner's judgment of

[1]The examiner found "The responses of all the witnesses, officers and directors of the applicant were responsive, comprehensive and frank." (R 1851)

the weight to be given to the testimony, and the inferences to be drawn therefrom, is therefore entitled to great weight; and his conclusion, based on detailed findings, that North American does not have a controlling influence over the management or policies of petitioner, is therefore an important circumstance bearing on the validity of the Commission's decision. *A. E. Staley Mfg. Co. v. Natl. Labor Rel. Board* (C.C.A. 7th), 117 F.2d 868, 878; *Burlington Dyeing & Finishing Co. v. Natl. Labor Rel. Board* (C.C.A. 4th), 104 F.2d 736, 738; *Conn. v. Natl. Labor Rel. Board* (C.C.A. 7th), 108 F.2d 390, 400; *Wilson & Co. v. Natl. Lab. Rel. Board* (C.C.A. 8th), 123 F.2d 411, 418; *Internat. Ass'n. v. Nat. Lab. Rel. Board* (Ct. App. D. C.), 110 F.2d 29, 34.

The Examiner's Findings and the Commission's Opinion Reveal the Lack of Basis for the Order.

Since the Commission (R 1912) accepted the facts as found by the trial examiner, a comparison of the examiner's findings with the Commission's opinion is substantially all that is necessary in order to determine whether the Commission's order is based on a fair and reasonable examination of the evidence before it, and whether the order is supported by substantial evidence.

A comparison of the examiner's undisputed findings with the matters set out in the Commission's opinion shows that some of the Commission's inferences are wholly unsupported, that the reasonable appearance of others results only from the Commission's failure to mention direct evidence showing that they are not permissible inferences, and that some of the statements

made in the Commission's opinion must be characterized as lacking in candor.

1. The Commission found that the California Railroad Commission "appeared by its representative to introduce in evidence a memorandum and other documents showing the extent of such Commission's regulation over PG&E" (R 1885)

No mention is made of the fact that the Railroad Commission appeared at the suggestion of the Commission, and that the memorandum filed by it not only showed that Pacific Gas was regulated in all phases of its business, but also concluded with the following:

> "Yet, as also stated in the beginning, we are aware of no instance during the course of this Commission's regulation of Pacific Gas and Electric Company when its management or policies appear to have been either controlled or influenced by North American Company. We may add that we perceive no public interest existing within the State of California, either for the protection of investors or consumers, which compels the conclusion that applicant, Pacific Gas and Electric Company, should be declared subject to the obligations and duties imposed by the federal Holding Company Act upon subsidiary utility corporations." (F 170, R 1875)

2. The Commission recited that Pacific Gas directors, who were apprehensive of the power that North American would acquire by the ownership of such a large block of securities, were informed that North American had given assurances that it would not interfere with Pacific Gas's management (R 1893).

No mention is made of the wealth of testimony and of the findings of the examiner based thereon that—

> "Applicant's president stated to North American representatives that neither he nor Applicant's directors would agree to any transaction which would jeopardize the control of Applicant by local directors who had developed Applicant's properties over the past 75 or 80 years, but that he had satisfied himself that the transactions would not jeopardize that control. It was realized by North American that if it made the sale, it would be giving up control of its California subsidiaries, but that North American would be in the position merely of an investor. North American, through its representative only, gave assurance to Hockenbeamer that it did not desire to acquire control of Applicant, and would not attempt to interfere with the management or policies of Applicant, but would consider itself merely as an investor. This was reported to Applicant's directors. It was only after Mr. Hockenbeamer had advised Applicant's Executive Committee and its Board of Directors of these assurances by North American, that the purchase was authorized, and it would not have been authorized unless such assurances had been given" (F 66-7, R 1821).

3. The Commission found that "It was orally agreed that North American would be entitled to three members on applicant's board" (R 1895).

No mention is made of the fact that, as found by the examiner, this is the number of directors North American could elect by cumulative voting of its own shares (F68, R 1823).

4. The Commission states in connection with the acquisition of Great Western and San Joaquin that "Most of the employees of the acquired companies were retained, some of them in high executive positions which they still hold. Very soon after the acquisition of securities, the properties of the newly acquired subsidiaries were consolidated with those of applicant" (R 1895).

No mention is made of the facts, as found by the examiner, that the properties were incorporated into the Pacific Gas system under the direction of Paul M. Downing, Vice-President and General Manager of Pacific Gas, "without participation of North American or its subsidiaries in any decision with respect to personnel or otherwise"; that unnecessary personnel was eliminated; that the offices of the subsidiaries were moved to the Pacific Gas office, and that concurrently with the taking over, "all indebtedness, contracts, procedures, arrangements and relationships previously existing between said acquired companies and North American and its subsidiaries were cancelled and terminated, and all North American representatives on the Boards of the acquired companies resigned so that thereafter the only connection North American had with applicant was that of stockholder" (F 73, R 1825); nor is any mention made of the fact that previous to the acquisition North American supervised and controlled the acquired companies in almost every detail, and was paid therefor sums aggregating approximately $50,000 per year, which payments, and all supervision and management terminated at the

time of the sale (F 77-82, R 1827); nor is mention made of the fact that North American had owned its interest in Great Western and San Joaquin for a period of less than five years prior to the sale.

5. The Commission stated the number of shares of stock and relative percentages held by stockholders resident within and without California (R 1898).

No mention is made of the fact, as found by the examiner, that "58,472 shareholders, owning 4,705,948 shares, reside in the territory served by Applicant" (F 30, R 1799); that this constitutes more than 40% of the outstanding stock; and that Pacific Gas has sold directly to purchasers without underwriting more than $140,000,000 par value of its stock, principally to residents of its territory, most of whom are consumers, with resultant improvement in public and consumer relationship (F 33, R 1801).

6. The Commission found that "at only two meetings, both in 1931, were enough shares in attendance, in addition to the shares held by North American, to constitute a quorum" (R 1898).

No mention is made of the fact, as found by the examiner, that "If North American had not been represented at the remaining meetings, or had withdrawn therefrom, a quorum could probably have been obtained (without the representation of North American) by sending out an additional notice—as an attendance of 75% or more of the stockholders could have been and can be obtained for any stockholders' meeting by sending out a second notice" (F 107, R 1843).

7. The Commission states the number of members of the Pacific Gas Board and that the present board consists of "five directors who are officers and full-time employees of applicant, eight directors who are prominent San Francisco businessmen, and two directors who are admittedly representatives of North American" (R. 1899).

No mention is made of the following facts, as found by the examiner: "This Board of Directors is composed of a group of very intelligent men of initiative, independence and ability" (F 122, R 1851); that "All present Directors and principal officers, with the exception of Directors Fogarty and Freeman (who are officers of North American), are residents of San Francisco and vicinity; were either born in California or came to California early in life and have resided in California since that time; are prominently identified with California enterprises, and have no substantial interest in any eastern business or any corporation whose business is not principally conducted in California. * * * Many of the present directors were connected with utilities which were merged with Applicant, or its predecessors, and the fathers of four directors (Directors C. O. G. Miller, Norman B. Livermore, A. E. Wishon and W. W. Crocker) were active in the affairs of predecessor companies. All of the directors, with the exception of Directors Fogarty and Freeman, know each other well, some are associated together in other enterprises, and several have known each other from boyhood" (F 38-40, R 1807); nor is any mention made of the large number of shares

which almost all of the directors (excepting the two North American representatives) own personally, or which are owned by family and affiliated interests (F 37, R 1804).

8. The Commission found that Earl (a North American representative) "was very active as a director and executive committee member, attending substantially all the meetings. * * * For these services Earl received a salary of $12,000 per year from North American; he received no salary from PG&E" (R 1900), the implication being that Earl was influential in Pacific Gas affairs and that he was paid $12,000 solely for these services.

No mention is made of the fact, as found by the examiner, that while Earl "was a regular attendant at meetings he never expressed any views regarding North American attitude on pending matters"; and that while he received a salary of $12,000 per year from North American, this was "largely in recognition of his long past service as an officer of Great Western" (F. 86, R. 1831). Nor is mention made of the fact that the evidence showed that while Mr. Earl was active in taking notes of the proceedings at the meetings, he was no more active or important as a participant in such meetings than any other director (R 669, 732).

9. The Commission states that on Earl's death "Black and Hockenbeamer discussed a possible successor to Earl but arrived at no solution, and shortly thereafter Black became applicant's president. No

one has since been appointed to carry on the duties formerly performed by Earl" (R 1901). This carries the innuendo that there was some connection between the failure to appoint a successor to Earl, and the fact that Mr. Black became President of Pacific Gas.

No mention is made of the fact, as found by the examiner, that the reason no successor was appointed to Earl was that arrangements had been made that "copies of the minutes and reports submitted to the Executive Committee would be sent to the Directors named by North American—hence they would be as well informed as if a representative were present. North American's decision not to ask that Mr. Earl be succeeded by a North American representative was made prior to Mr. Black's election as president and was not due in any way to Mr. Black's election" (F 87, R 1831).

10. The Commission recites "None of the applicant's other large stockholders [except North American] has representation on the board, with the possible exception of Pacific Lighting Corporation" (R 1901), thus implying that the directors do not own or are not associated with large stockholdings.

No mention is made of the fact, as found by the examiner, that with the exception of Vice-President and Secretary Foote, all of the Directors (excepting North American Officers), including the Pacific Gas officers, own a substantial number of its shares and that six of them hold directly and by family and affiliated interests in excess of 90,000 shares each (F 37, R 1804).

11. The Commission states "Applicant's president has always been its chief executive officer * * *. Since November 20, 1935, Applicant's president has been James B. Black, formerly the vice-president of North American whose job it was to keep close watch over North American's interest in applicant" (R 1902), thus insinuating that Black, a former North American officer, holds a dominating position in Pacific Gas, and that he watches over North American's interest.

No mention is made of the fact, as found by the examiner, that "Throughout its history, Applicant's operations have been under the immediate supervision of an officer designated as Vice-President and General Manager", a position then occupied by P. M. Downing, an employee of applicant since its organization; that the principal executives of Pacific Gas have been connected with it for many years and are very active in its affairs and in the formulation of its policies, acting through committees and otherwise (F 43-51, R 1809); that its Executive Committee and Board of Directors are extremely active, and that neither the Board nor the Executive Committee are dominated by any individual or group, but there is free and full discussion in which each member and the officers in attendance participate (F 35-36, R 1802).

Nor is mention made of the fact, as found by the examiner, that "There was and is no understanding or agreement (between Mr. Black and North Ameri-

can) that Mr. Black would consult with North American, or keep it advised, or in any way act for or in relation to it, after he became president of Applicant, nor is he in any respect the representative of North American. Mr. Black, as President and Director of Applicant, has not acted as a representative of North American, nor has he been controlled or influenced by that company, or by any of its officers" (F 118-119, R 1849).

12. The Commission states in connection with the election of Mr. Black as President, that the Directors testified they selected Mr. Black "because he was a comparatively young man, a Californian who was familiar with the Great Western properties as both an operating man and an executive, and because his experience in New York had given him excellent training in utility financing" and that Director Miller "called Fogarty (Black's superior at North American) to get his permission to approach Black, and then called Black to ask whether Black would accept the presidency if the board elected him" (R 1903).

No mention is made of the fact, as found by the examiner, that "No suggestion of Mr. Black's election was made by anyone in North American, by whom his selection was not anticipated, and to whom it was a surprise" (F 116, R 1847); that Mr. Black was brought to California "at the age of 12 when his parents moved there to reside and has lived in San Francisco and vicinity ever since, with the exception of the period from 1927 to 1935 when he resided in New York and served as a Vice-President of North

American" (F 111, R 1844); that he was educated in Oakland and San Francisco schools and at the University of California; that on graduation in 1912 he became an employee and later an officer of a subsidiary of Great Western and continued with that company until he went to New York and became a Vice-President (but not a director) of North American; that he remained in New York from 1927 to 1935 when he was elected President of Pacific Gas; that "His selection was entirely the result of the initiative of Mr. C. O. G. Miller and other California directors, many of whom had become acquainted with Mr. Black's capabilities prior to 1927 when he was in active charge of Great Western, an active competitor of Applicant. Several of these directors were prepared to suggest Black if Miller had not done so. The fact that he was a Californian and was familiar with some of Applicant's properties, as well as his wide experience and youth were deemed qualifications, and his selection met with the unanimous approval of the Board of Directors. Mr. Black was also recommended to Mr. Miller by a number of large stockholders" (F 113-115, R 1845-7). * * * "Prior to his election, it was agreed between the directors and Mr. Black that he would completely sever all relationship with North American and its affiliates. This he did in November 1935 just prior to his election as Applicant's president. He thereupon moved his residence back to California where he has since resided" (F 117, R 1848).

13. The Commission states, respecting Mr. Black, that "Since he has been president, Black has nomi-

nated as directors five local men and two representatives of North American * * * Black and Fogarty testified that Black did not discuss with North American whom he would nominate as local directors" (R 1903), thus implying that such directors were selected solely by Mr. Black.

No mention is made of the fact, as found by the examiner, that new directors are selected by the President "with advice and approval of other board members. Nominees for election as representatives of North American have been designated by it" (F 54, R 1815).

14. The Commission relates in some detail the procedure in connection with the proxy committee for the stockholders' meeting (R 1904).

No mention is made of the fact, as found by the examiner, that "Neither North American nor any of its officers have ever made any suggestion or request, or been consulted with respect to the form of proxy, the proxy machinery, or the stockholders' meetings. North American never suggested the name of any person to serve on the proxy committee" (F 143, R 1857).

15. The Commission devotes almost two pages to a description of Pacific Gas financing (R 1905).

No mention is made of the fact, as found by the examiner, that "North American has never underwritten any securities issued by Applicant, nor participated in any way in its financing. It has not been consulted, nor has it made suggestions as to who should be the underwriters of Applicant's securities, who

should be the members of underwriting syndicates or participated in any discussions or negotiations relating to any underwriting, except that in 1935, Mr. Black (then with North American) suggested to Mr. Hockenbeamer that Blyth & Co. be given the leadership of a syndicate then being formed because Blyth & Co. was a California house. Mr. Hockenbeamer chose Lazard Freres & Co., Inc. All negotiations respecting the issue and sale of Applicant's securities have been conducted in San Francisco by the President of Applicant directly with the underwriters" (F 154, R 1868). Nor is any mention made of the fact that Blyth & Co., Inc., the underwriter of the securities issued since Mr. Black became President, has its principal office in San Francisco, and that Mr. Blyth, its president, "has been a close friend for many years of most of applicant's directors and is well known to all of them" (F 149, R 1864); and that "North American had nothing whatever to do with the selection of Blyth & Co. as underwriter" (F 152, R 1867).

16. The Commission devotes two pages to a topic headed "Reports to North American" and states that "Applicant regularly sends to North American a variety of detailed weekly and monthly reports". These reports are described in great detail (R 1907).

No mention is made of the fact, as found by the examiner, that these reports are not sent to North American as the Commission states, but are sent to the officers of North American who are directors of Pacific Gas, and are sent to them in that capacity.

No mention is made of the fact, as found by the examiner, with respect to these reports that "The officers of North American who are directors of Applicant receive periodical reports from Applicant, such reports being in substance the same that have been received pursuant to and since the 1930 sale * * * These reports convey less information than is received by the directors and members of the Executive Committee who are persent at such meetings" (F 94, R 1835) and "There is no difference between the information received by North American nor in the other relations with PG&E since Mr. Black became president of Applicant, and those received, or that existing before that time" (F 96, R 1838).

17. The Commission states that "North American has never requested any information from Applicant which has been refused to it"—the implication being that such information is frequently requested and supplied (R 1909).

No mention is made of the fact, as appears from the record, that practically no requests for information have been made by North American since it has been a stockholder, and that, as found by the examiner, at present and in the past the communications and contacts between North American and its officers and Pacific Gas and its officers have been infrequent and unimportant (F 91, R 1834).

18. The Commission sets forth under the heading "Telephone Calls and Personal Visits" that there are four to nine long distance telephone conversations each year (R 1910) and infrequent visits.

The Commission does not state, as found by the examiner, that "At present and in the past, the communications and contacts between North American and its officers and Applicant and its officers have been infrequent and unimportant" (F 91, R 1834).

19. The Commission finds that Pacific Gas "* * * does not as a routine matter receive advice on rates, accounting, engineering, tax matters, sales, depreciation, personnel, and other similar operating matters. It does not participate in North American's group purchasing arrangements and there have been no monetary loans between the companies" (R 1910).

The implication of this is that Pacific Gas does receive from North American, advice on the subjects mentioned but not as a routine matter. This is not only entirely unsupported by evidence; it is directly contrary to the evidence.

No mention is made of the fact, as found by the examiner, that North American does not give and never has given any advice to Pacific Gas on any of the matters mentioned and that "Neither North American nor its officers have made any suggestions or recommendations with respect to pending matters under consideration by Applicant, nor have they attempted at any time to influence Applicant's action or the action of any director in any respect" (F 98, R 1838); that "Mr. Black has never received any request or instructions from North American or its officers, respecting the personnel, business affairs or policies of Applicant * * *. Mr. Black has never

sought or received the advice, approval or recommendation of North American or its officers on any personnel, dividend, rate, salary, refinancing or other pending matter" (F 120, R 1849); nor is any mention made of the following (which subjects in other control cases, under the Act, have been prominently mentioned by the Commission as indicating the presence or absence of control):

a. "There have been no contracts between Applicant and North American or its subsidiaries except the contract dated March 29, 1930" (F 131, R 1855).

b. "Neither North American nor any of its affiliates or employees has ever performed any services with or without charge, for Applicant" (F 132, R 1855).

c. "There has been no exchange of operating information between Applicant and the admitted subsidiaries of North American" (F 133, R 1855).

d. "There have never been any intercompany loans or financial transactions between Applicant and North American or its subsidiaries" (F 134, R 1855).

e. "All of Applicant's major acquisitions and construction projects have been and are decided upon, budgeted and carried out within the PG&E organization and entirely independent of North American at all stages" (F 135, R 1855).

f. North American's organization has never assisted Applicant in the preparation of any Registration Statements, nor has its Secretarial Department

ever assisted Applicant in any manner (F 136-7, R 1855).

g. "Applicant and North American do not employ the same accountants, attorneys or engineers" (F 138, R 1856).

h. "Applicant does not employ any former officers or employees of North American, with the exception of Mr. Black, and with the exception of those who were officers or employees of acquired companies at the time of their acquisition. North American has never recommended or suggested to Applicant the employment of any person or been asked its views thereon" (F 139, R 1856).

i. "No employees of Applicant, nor of North American or of its admitted subsidiaries have ever been loaned by either to the other" (F 140, R 1856).

20. The Commission states: "Evidence has been offered with respect to only one occasion when North American's wishes on a particular matter appear to have been contrary to the action of Applicant's directors" (R 1911)—referring to the dividend incident in 1933 when North American requested that Pacific Gas directors reconsider their action in reducing the common stock dividend and the directors declined to do so.

The implication of the Commission's statement is that on other occasions North American did express its wishes and that the Applicant's directors acted in accordance with such wishes.

The implication of the Commission's statement is wholly unsupported by any evidence, and is directly contrary to all of the evidence and the findings on the subject, which are that North American never expressed any wishes to the Board of Directors or any officer on any matter other than this particular one. No mention is made of or effect given to the findings of the examiner that "Mr. Black has never received any request or instructions from North American or its officers, respecting the personnel, business, affairs or policies of Applicant, and North American has never made any attempt, directly or indirectly, to control or influence his action or the management or policies of applicant" (F 120, R 1849). Numerous other findings by the examiner are to the same effect—negativing, specifically, every conceivable variety of attempt to influence Pacific Gas on any matter (see F 98, R 1838, F 99, R 1839, F 120, R 1849, F 126, R 1852, F 139, R 1856, F 145, R 1857, F 170, R 1875), except on the matter of the dividend reduction, when its attempt to influence the directors to maintain the regular dividend was entirely unsuccessful.

21. The Commission recites the circumstance in 1933 when Pacific Gas reduced its dividend and North American's request for a reconsideration was not acceded to. In that connection the Commission states that in the fall of 1936 "Black recommended the restoration of the $.50 per share dividend. He testified that the earnings justified the restoration and denied

that North American requested the action" (R 1911). The implication is that Mr. Black may have recommended the restoration because of his previous connection with North American.

No mention is made of the fact, as found by the examiner, and as shown in finding 24 that the annual earnings of Pacific Gas, which had fallen to $1.61 per share in 1933 when the dividend was reduced, had increased to $2.71 per share in 1936 when the dividend was restored; nor of the fact, as found by the examiner, that "Mr. Black has never received any request or instructions from North American or its officers on any * * * dividend * * * or other pending matter" (F 120, R 1849); or that "Mr. Black, as President and Director of Applicant, has not acted as a respresentative of North American, nor has he been controlled or influenced by that company, or by any of its officers" (F 119, R 1849).

22. The Commission states that "The facts are strikingly similar" in this case to those in *Detroit Edison Co. v. Securities & Exchange Commission,* 119 F.(2d) 730.[1] What purports to be a statement of the facts in the *Detroit Edison* case is then set forth.

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[1]Judge Garrecht in his opinion says: "A glance at these cases (the *Detroit Edison* and *Hartford* cases) will show how utterly different were the facts there presented" (R 1763), and further with respect to the *Detroit Edison* case, "the facts in that case are so different from the one before us—that it cannot be considered an authority to support the action of the Commission here" (R 1765).

No mention is made by the Commission of the following facts in the *Detroit Edison* case,[1] which are disclosed by the Court's opinion in that case, and which furnish the basis for its decision:

> In 1902 a North American officer, with the assistance of Dow, later president of the Detroit Edison and a powerful figure in its affairs, arranged for the sale to North American of the stocks of the principal electric utility companies then operating in Detroit, Dow being paid by North American for his services and with the understanding that he was to manage the properties indefinitely.
>
> North American caused Detroit Edison to be incorporated, the organization meeting being held in North American's office. The legal details were handled by Sullivan & Cromwell, then and now the North American's attorneys, and then and now Detroit Edison's attorneys, and at all times with a member of the firm on the latter's board.

[1]The facts in the *Detroit Edison* case were summarized by counsel for the Commission in its brief filed therein as follows: "It is difficult to conceive of a case in which the facts are more conducive to an affirmative conviction of corporate control, than one which shows (1) admitted North American control at organization, (2) a plurality at all times of directors whose directorships are traced directly to North American, (3) absence of representation, in the management of the Edison company, of any substantial stockholder other than North American, (4) actual prevention of other stockholder representation, even representation of a stockholder owning more stock than North American, (5) numerous acts of participation, direct and indirect, on the part of North American in the affairs of the controlled company."

North American named all the members of Detroit Edison's first board. At the time of the hearing, four of the eight directors had been named by or were affiliated with North American. At least half and perhaps a majority of the present board are either associated with North American or derive their connection with Detroit Edison from North American.

The personal stockholdings of Detroit Edison's officers and directors are negligible, and they have no relation to any other substantial stockholder, besides North American. No stockholder other than North American ever appears to have designated a director.

North American was the original underwriter for Detroit Edison securities; it has managed, or participated in, or been invited to participate in, all Detroit Edison financing, and has made large profits therefrom. It was Detroit Edison's fiscal agent from the time of its organization until 1935.

When United Light and Power Company began to purchase Detroit Edison stock, North American increased its holdings. When United attempted to secure representation on Detroit Edison's board, the attempt was successfully resisted by Detroit Edison's management, led by Dow.

Detroit Edison has always maintained offices in North American's building in New York. For years it participated in joint purchasing contracts with North American and the latter's acknowledged subsidiaries, as well as maintained representation on the Station Advisory Committee made up of representatives of North Ameri-

can's subsidiaries. For the purpose of avoiding the application of the Public Utility Holding Company Act, various of these connections were terminated when the Act became law. In addition (not mentioned by the Court but found by the Commission) the offices of North American in New York and those of Detroit Edison in Detroit had been connected for many years by a private wire.

It was after all of these facts, and more, had been found, that the Commission and the court concluded that the Detroit Edison "had failed to carry its burden of proof."[1]

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[1]Orders of the Commission denying petitions for a declaration that a local utility was not a subsidiary of a holding company have been reviewed in four other cases, in each of which the order of the Commission was upheld. In some of these cases the court accepted the Commission's contention that absence of any control or controlling influence is a mere statutory exception to the intent of Congress to regulate all local utilities of whose voting stock 10% or more is owned by a holding company; but this proposition was unnecessary to the decision of any of these cases for the reason that in each of them the evidence showed the present existence of a controlling influence as we have here interpreted the meaning of those words; and the present existence of controlling influence was corroborated by a record of past transactions of the character which the Act was designed to regulate, other intercompany transactions, and exercise of controlling influence in the past. The cases herein referred to are: *Public Service Corporation of New Jersey v. S. E. C.*, 129 F.2d 899 (C.C.A. 3d); *Hartford Gas Co. v. S. E. C.*, 129 F.2d 794 (C.C.A. 2d); *American Gas and Electric Company v. S. E. C.*, 134 F.2d 633 (App.D.C.); *Koppers United Co. v. S. E. C.*, 138 F.2d 577 (App D.C.).

23. The Commission states "We agree with the finding of the trial examiner that the record does not reveal any past attempts by North American to interfere affirmatively with the management or policies of PG&E. But we also think that it is clear that the reason for this non-interference has been North American's complete satisfaction with the local management and that its failure to interfere has been purposeful" (R 1920).

No mention is made of the fact that every director of Pacific Gas, including those nominated by North American, as well as North American's president, testified that North American had no controlling influence over Pacific Gas and could not influence its management or policies if it did attempt to do so. The Commission's statement fails entirely to give probative effect to the unsuccessful attempt made in 1933 by North American to obtain a reconsideration of the Pacific Gas action in reducing its dividend. The mere fact that North American was satisfied with Pacific Gas' policies and management, while it might be used as an explanation for non-interference, does not prove, and is not a fact upon which an inference can be based, that North American, if it had been dissatisfied, could have exerted a controlling influence over Pacific Gas.

24. The Commission states "There is evidence to justify a finding that even at the present time North American exerts a real influence in the affairs of PG&E, even though this influence is exerted in a nega-

tive way. But our decision herein is based primarily on our finding that North American has the power—if the occasion arises and if it so desires—to make its influence felt in a substantial and affirmative manner" (R 1922).

No basis is given for this finding other than the following:

a. North American owns 17.71% of the Pacific Gas voting stock, which is a much larger holding than any other stockholder (R 1923).

b. North American's stockholdings would make it a "formidable opponent" in any proxy fight; and "the mere fact that there is a strong possibility that North American could prevail would, in itself, be a potent tool in influencing the management to give heed to North American's wishes" (R 1924).

c. That with the help of North American, the present management could prevent any other group from gaining control of petitioner; that it could break a quorum, and might prevent a merger or consolidation (R 1924).

d. That Mr. Black, President of Pacific Gas, was for eight years prior to his appointment, "a senior executive of North American,"[1] and that "It is wholly unreal to suppose that Black would be uninfluenced by these circumstances and, in his dealings with North American, would treat it as merely a large stockholder of PG&E" (R 1926).

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[1]Mr. Black was never a director of North American (F 114, R 1846).

No mention is made in connection with the foregoing assertions, that:

a. 48% of the voting stock of Pacific Gas is owned by Californians, more than 40% of all its shares being owned by residents of the territory which it serves, most of it bought directly from the Company without underwriting; that, as shown by the evidence and found by the examiner, the directors feel that Pacific Gas can best be managed by Westerners for Westerners (F 125, R 1852); that "North American could not, if it attempted to do so and its attempts were resisted by the local directors, secure sufficient proxies to obtain a majority of the stock represented at a stockholders' meeting" (F 127, R 1852); that "Neither by absenting itself from stockholders' meetings nor by attempting to impose conditions for its participation or voting therein could North American control Applicant or subject its management or policies to a controlling interest, as its absence would not prevent the obtaining of a quorum, or if it did, the incumbent directors would remain in office and any vacancies would be filled by vote of the remaining directors" (F 128, R 1853); that "The maximum influence that North American could exert on the control, management or policies of Applicant * * * would be the naming of four North American representatives out of a board of fifteen directors" by cumulating its votes (F 129, R 1853).

b. As found by the examiner, North American does not own any stock in any companies which are large

stockholders in Pacific Gas, and has "never discussed or communicated with any of them, or the officers of any of them respecting the business and affairs of Applicant" (F 110, R 1844).

c. North American could not solicit proxies for a stockholders' meeting of Pacific Gas nor purchase any of its stock without securing the permission of the Commission. Since the purpose of the enactment of the Act was to restrict the control of local companies by holding companies, it is wholly unreal to suppose that six years after the enactment of the Act, it would be possible for a registered New York holding company to engage in a proxy battle with the local directors and management of a California utility, and secure control thereof. To suggest this is to imply that the Act is a failure and that the Commission would condone the attempt of the holding company to secure control of the local company.

There is not one iota of evidence in the record on which the Commission's speculative conclusion could be reached. On the contrary, there is direct and positive evidence that no such situation is possible.

Every director, and every principal executive officer of Pacific Gas appeared as a witness and testified under oath in terms or in substance and effect as follows:

a. That North American exercises no controlling influence over the management and policies of Pacific Gas, which are determined by its Board of Directors, all of whom (except Fogarty and Freeman) are well acquainted with each other,

regularly attend meetings and freely express their individual views respecting matters of management and policy.

b. That if North American were to attempt to control Pacific Gas or subject its management or policies to a controlling influence, its attempt would be unsuccessful.

c. That any attempt by North American to secure sufficient proxies to control a stockholders' meeting would have no chance of success, if opposed by Pacific Gas directors (other than Directors Fogarty and Freeman) (F 27, R 1797).

Each director (excepting Directors Fogarty and Freeman) also testified that he would oppose any attempt by North American to control or influence the management or policies of Pacific Gas (F 25, R 1852).

Mr. Fogarty, Chairman of the Executive and Finance Committees of North American (and a former President), President Shea and Vice-President Freeman of North American, all testified that they did not believe that North American could gain any such control or controlling influence.

The Commission ignores and fails to give weight or effect to the uncontradicted testimony of the directors, all of whom (except Fogarty and Freeman) testified that they were not subject to any such influence and would not submit to such influence were North American to attempt to exercise it. The Commission also ignored the presumption that these direc-

tors would fulfill their legal obligation to act as directors of Pacific Gas solely in light of what they sincerely believed to be in its best interests and not to exercise their offices as directors of Pacific Gas for the benefit of or subject to the domination of North American or any other individual stockholder.

The very findings of fact requested by Commission counsel prove this. The following is quoted from the requested findings, filed as part of the record, substituting, however, references to the pages of the printed record for references to the typewritten record.

> "100. Each of Applicant's local directors to whom the question was propounded, namely, Messrs. Miller, McKee, Crocker, Chickering, Livermore, Coghlan, Palmer, Nichols, McIntosh, Wishon, and Black, testified that it was his opinion that North American could not, if it attempted to do so and its attempts were resisted by the local directors, secure sufficient proxies to obtain a majority of the stock represented at a stockholders' meeting (R 619, 683, 718, 744, 827, 876, 911, 925, 951, 1006, 1103).
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> "The several directors gave various reasons for their answers—Mr. Miller[1] stated:
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> > 'I assume, of course, that the management of the Pacific Gas and Electric Company would remain proper and would attempt to fulfill its duties. The Board of Directors of the Pacific Gas has representatives of a number of groups of influential people in San Francisco. I think

[1]Chairman of the Board of Pacific Lighting Corporation, Trustee Stanford University, Director of many corporations, more than 40 years a public utility executive.

if those groups agreed on any course as being the proper one for the corporation to follow, and the management of the corporation was in accord with that, I think they could stand up against anything.' (R 619)

Mr. McKee[1] stated:

'I think it would not be. I think, on the scheme of cumulative voting, if there was a very large representation at the annual meeting they would be able to elect two or three directors, but if there was only 50% representation, 51% representation of stock present, they wouldn't be able to elect with their holdings more than five directors.' (R 683)

Mr. Crocker[2] stated that he thought it had

'been proven over a period of years that California corporations are best run in California and that the stockholders would react to that logic that it "would be a cinch" to persuade Applicant's stockholders that their interests would be better served by "California management than by North American Management".' (R 718)

Mr. Chickering[3] testified:

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[1]Chairman of the Board American Trust Company, former president The California Oregon Power Company, director of many corporations.

[2]President of the Crocker First National Bank of San Francisco and whose father had been a director of Applicant.

[3]A director of Southern Pacific Company and many other corporations, and experienced over many years in public utility management and affairs.

'Well, in the first place, the Pacific Gas and Electric Company is, and always has been a California Company, and not only I, but I think the public here generally are pleased with that situation. * * * They don't want any outsider dominating it. * * * In the next place I don't think that the holding company domination is at all popular; and in the next place, the North American Company is practically unknown out here, either for good or bad.

'The only time I ever heard it spoken of was when someone tried to bring it up in connection with some Fresno rate case quite a while ago.

'And furthermore, I think the California public are very well satisfied with the management of the P. G. & E. being in California, and in the hands of California men. I don't think they want any change, or any outside domination.' (R 744)

Mr. McIntosh:[1]

'Well, in the first place this company is a sort of California baby and Californians—I speak now because I was not born here—Californians have a sort of native son complex, and they don't like the interference of outside people.

'They are proud of their company because they have been connected with it through stock ownership for maybe a lifetime, most of them, many of them, and they would resent any outside interference of any character or kind.

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[1]Chairman of the Board of the Bank of California, and director of many other corporations.

'In the next place, it would be so simple to show that no good could possibly be expected to come from an alignment with the North American Company or any outside company, inasmuch as they were not—would not be able to furnish from any nearby source that they had any power to meet peak loads or anything of the kind. There would be no union of that kind.

'The Pacific Gas and Electric Company certainly couldn't be improved by any engineering counsel or advice that they could give. They certainly couldn't be helped materially by any financial advice that they could give and so there wouldn't be no end that would be beneficial to stockholders that could be gained by any such thing, and the stockholders could readily be told that and would be told that, or would know it themselves.

'Speaking of our "Native Son Policy", it is a matter of common record here that we have one of our large corporations, not incorporated in California either, that California has spanked as thoroughly as any corporation was ever spanked by anybody. It has become a political issue and campaigns were fought on it, but just as soon as somebody else on the outside started to accuse them of anything the entire outfit got up and defended them.

'Now, that is what I mean by the "Native Son Policy". These people are proud of this thing; it is their own. I have forgotten the figures, but I think something like between 45 or 50 per cent of the stockholders have California addresses.' (R 951)

Mr. Black testified that he would oppose any attempt by North American to control or influence the management or policies of the Applicant with 'every resource at my command' (R 1103) and that he was sure they would not be successful in proxy fight because

'This company has a rather unique position in San Francisco and in California. It has been known for many years as a California company. The fact that the Great Western Power Company was controlled by an eastern company, the Western Power Corporation, was a great handicap to the Great Western Power Company in doing business here and particularly in competition with the Pacific Gas and Electric Company. I know something of that feeling. I think 48 percent of our stock is held here in California and I think without question that stock would be almost unanimously opposed against any attempt by any eastern interest, particularly any New York holding company, to get control of the company.

'Our directors are men not only who are men who own, or are able to influence very large blocks of stock directly, but they have a standing in the community and in the business world which I think would be very decisive in getting large amounts of stock proxies from holders outside of the State. I am sure that the community as a whole would be entirely on the side of the company in any such fight.' " (R 1103)

The Requested Findings of Fact by counsel for the Commission (Findings 91, 92) also contain the following:

> "Mr. Fogarty (President of North American) testified that in his opinion the management and policies of Applicant were not subject to a controlling influence by North American (R 1449); that as a practical matter that company could not obtain legal control of Applicant; that he did not believe North American could acquire control of Applicant over the opposition of the local directors because the latter
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> 'is an old established California company. Its management has always been local. Its directors apparently are men of considerable standing, and undoubtedly would be able to obtain enough proxies from the stockholders to prevent the acquisition of control by any other interests that sought it.'" (1453)
>
> "Mr. Freeman, a Vice-President of North American, testified that if the time should ever come when North American felt that it should exercise a control or controlling influence over Applicant, in his opinion it would be better for North American to sell its interest than to try to exercise control.
>
> 'because the repercussions from California would hurt our investment far more than if we allowed it to be known that we were going to sell.';
>
> that with the present Board or any comparable Board composed of local people he did not believe North American could obtain control of Applicant

(R 1643); that if the management of Applicant became incompetent, in his opinion the North American could not cure it

> 'by trying to get into the situation ourselves. The most we could possibly do would be to consult with the other directors there and get them to agree to putting in a management that was competent; and if we were unable to do that, I am quite sure that our interests would be better served by getting out of the situation rather than trying to move in, because I don't believe a foreign interest, as we would be, could advantageously operate a company of the character of the P. G. & E.' (R 1645)

that because of the representation made in 1930 that North American would not interfere with the management of Applicant, in his opinion it was under a moral obligation not to do so as long as the local Board felt that they had the situation in hand and did not desire North American to interfere (R 645); that he was of the opinion that North American could not control Applicant or exercise a controlling influence against the wishes of the local directors unless it owned substantially 50% of the voting securities of Applicant, because

> 'in that company probably more than in any other company you would seem to have to have practically legal control before you could do anything that appeared to favor the controlling interest as against the rest of the stockholders. I am sure you would get a very strong reaction.' (R 1654)"

25. When the Commission suggests that "It is wholly unreal to suppose that Black would be uninfluenced" by North American because of his employment for seven years by it in New York (R 1927), it suggests an inference directly contrary to every bit of evidence of record. Not only did Mr. Black testify under oath that he had not been and could not be influenced by North American, but the North American officers testified to the same effect. Every director testified, as found by the examiner, that he has never "at any time observed anything which indicated that Applicant was controlled, directly or indirectly, by North American, or that its management or policies were subject to a controlling influence, directly or indirectly, by that company" (R 1852). The examiner found as a fact "There was and is no understanding or agreement * * * that Mr. Black would consult with North American or keep it advised, or in any way act for or in relation to it, after he became president of Applicant, nor is he in any respect the representative of North American" (R 1849); that "Mr. Black, as President and Director of Applicant, has not acted as a representative of North American, nor has he been controlled or influenced by that company, or by any of its officers" (R 1849).

The suggestion of the Commission that Mr. Black is subject to influence by North American,[1] because

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[1]The constant reference to the fact that Mr. Black was once an officer of North American is one of the most striking characteristics of the Commission's opinion, which refers

for a period of eight years, midway in his career, he was one of its officers, is not only most unfair to Mr. Black, but is entirely unwarranted by the evidence which shows, as found by the examiner (but not mentioned by the Commission), that Mr. Black is a Californian, has lived most of his life in California, was educated and brought up there, was selected as president by the California directors who had known him for many years; that his selection came as a surprise to and was not welcome to North American; and that Mr. Black agreed specifically in connection with his selection as president, to sever all relations with North American, which the examiner found as a fact, that he did.

26. The Commission makes no mention of the fact as found by the examiner, that the evils mentioned in Section 1 of the Act, and which the Act was enacted to prevent, do not exist with respect to Pacific Gas (F 27-33, R 1797; F 161-176, R 1873).

Summary.

The single issue was whether at the time of the hearing the management or policies of Pacific Gas were subject to the controlling influence of North American.

Voluminous evidence, oral and documentary, was presented to show that no such controlling influence

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to him by name more than 60 times. But no evidence or facts other than his employment by North American for 7 years are cited as forming any basis for an inference that he would be subject to North American influence.

existed. Every witness (and the witnesses included every director and officer of Pacific Gas and the principal officers of North American) examined on the subject testified that during the entire 11 years that North American has been a stockholder, there had never been any attempt by it to influence in any way the officers, directors, policies, actions, or management of Pacific Gas. They further testified that as of the date of hearing North American did not have any such controlling influence; that if it should attempt by proxy fight or otherwise to exert such an influence, the California directors would unanimously combat such attempt, and that such an attempt would be unsuccessful. All of these facts were specifically found by the examiner who heard all of the evidence and found that the responses of "all the witnesses, officers and directors of the applicant were responsive, comprehensive and frank" (F 122, footnote (70), R 1851).

The records of correspondence and telephone calls for the entire 11 years were examined by Commission representatives and not one iota of documentary or other evidence was produced, notwithstanding the extensive and searching examination of all witnesses by Commission counsel, to show any attempt to exercise a controlling influence over Pacific Gas, or which would support an inference that such a controlling influence existed.

Stripped to its essentials, it is clear that the Commission's conclusion that Pacific Gas failed to make a case is based wholly on surmise and speculation, without the support of substantial evidence.

In the last analysis the Commission's decision rests upon its argument that because North American owned 17.71% of Pacific Gas stock, North American might at some time in the future, as the result of a proxy fight, secure a controlling influence. The evidence shows without contradiction that this could not happen. At most, the Commission's view is mere speculation as to a hypothetical future event, and does not fulfill the requirement of the statute that the controlling influence be presently in existence. If the Commission feels that there is any real possibility that a situation might arise in the future where North American could gain such a controlling influence, it could guard against such a contingency by making a conditional order as contemplated by the Act, a provision which has been ignored by the Commission in this case, and not mentioned by it.

Having in mind that Pacific Gas was proving a negative fact, i.e. that North American did not have a controlling influence at the time of the hearing, an examination of the evidence and a reading of the examiner's findings show that this was amply proved, and that the conclusion of the Commission that it was not proved, is based upon pure speculation and is unsupported by substantial evidence.

The uncontradicted evidence shows:

1. That during the entire 11 years it has been a stockholder, North American has never exercised a controlling influence over Pacific Gas. The Commission itself agrees "with the findings of the Trial Examiner that the record does not

reveal any past attempts by North American to interfere affirmatively with the management or policies of P. G. & E." (R 1920)

2. That the only time North American attempted to influence Pacific Gas action, i.e., when in 1933 it asked the directors to reconsider their action in reducing the dividend, the attempt was wholly unsuccessful.

3. That none of the directors or officers of Pacific Gas (except the two North American nominees) is subject to the controlling influence of North American.

4. That the ownership of 17.71% of Pacific Gas stock does not give North American the power to exercise a controlling influence, and that in a fight for proxies North American could not secure control.

5. That there have never been any business transactions or dealings of any kind between Pacific Gas and North American (except the original 1930 purchase): there is an entire absence of inter-company transactions, and none of the evils which the Act was designed to prevent have existed or do exist with respect to Pacific Gas.

The Commission has held that the "controlling influence" mentioned in the Act must be sufficiently powerful to bring about the evils that the Act is designed to guard against (*Manchester Gas Company*, 7 S.E.C. 57, 62).

> "If the 'controlling influence' is sufficiently extensive to embrace the power to bring about the evils that the Act is designed to guard against,

the statutory standard under Section 2(a)(8) is satisfied."

The evidence shows conclusively that the evils the Act is designed to guard against do not presently exist, and that North American does not possess and cannot possess any controlling influence sufficient to bring them about.

To be subject to the Act, Pacific Gas must as a fact at the time of the hearing be subject to the controlling influence of North American. The Commission finding, on the basis of speculation, that at some future time North American might obtain such a controlling influence, as a result of a proxy fight or otherwise, certainly does not measure up to the requirements of the statute so as to subject Pacific Gas to the obligations, duties and liabilities of the Act; and the attempt of the Commission to bring Pacific Gas under its jurisdiction is wholly unsupported by any evidence of record.

III.

THE COURT BELOW DID NOT GIVE THE REVIEW CONTEMPLATED BY THE ACT

The proceeding in the court below, under Section 24(a) of the Act, to review the Commission's order, is an original judicial proceeding, being the first judicial hearing of the case. See *Commission v. Havemeyer,* 296 U.S. 506, 511, 519; *Chamber of Commerce v.*

Federal Trade Commission (C.C.A. 8th), 13 F.2d 673, 674.

In *Natural Gas Pipeline Co. v. Federal Power Commission* (C.C.A. 7th), 128 F.2d 481, 484, the Court said:

> "We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit."

It was therefore error for the court to affirm the order of the Commission by an equal division. The effect of such affirmance is to deny the judicial review to which, by the statute, the parties are entitled.

In *Durant v. Essex Company* (1868), 7 Wall. 107, this Court held that affirmance of an appeal by an equally divided court decided nothing, and was equivalent to dismissal of the appeal.

Section 24(a) imposes a positive duty on the Circuit Court of Appeals to determine the questions arising out of a petition to review an order of the Commission. The section provides that upon the filing in the Circuit Court of Appeals of a transcript of the record before the Commission "such court shall have exclusive jurisdiction to affirm, modify or set aside such order in whole or in part". The power of the

Commission itself is lost during the pendency of the proceeding and the court is bound to decide the controversy.

In an original proceeding before a court made up of more than one judge, concurrence in a decision by a majority of the court is essential to any action. If such concurrence cannot be obtained, the matter must remain in *statu quo*, in the absence of some provision such as formerly existed in connection with the Circuit Courts of the United States, when, on a division of opinion, the matter could be certified to a higher court for disposition. For a court of first instance, equally divided on the merits, to attempt to dispose of the matter one way or the other amounts to a decision of the case by less than a majority of the court (21 C.J.S. 296).

In re First Congressional District Election, 295 Pa. 1, 144 Atl. 735, 739, it was held:

> "When a legal or semi-legal tribunal consists of only two members, neither one of them can perform an affirmative act changing or which may change an existing condition; for it takes a majority of the whole body to do this and one is not a majority of two. It is a universal rule that when a judicial or semi-judicial body is equally divided, the subject matter with which it is dealing must remain in statu quo."

See also: *Deglow v. Kruse*, 57 Ohio St. 434, 49 N.E. 477; *In re Kings Co. E. R. Co.* (1879), 78 N.Y. 383, 385.

The rule differs in this respect from the rule on appeal where a judicial decision having once been rendered, it is proper for the appellate court, being equally divided in opinion, to affirm the judgment. However, even in this situation it has been the practice of this Court, where a change in the personnel of the Court is in contemplation, to grant a rehearing, so that the appeal may be disposed of on the merits. In 313 U.S. at 596 and 597 eight rehearings were so granted.

Apart from the constitutional duty of the courts to determine whether an administrative body has acted pursuant to law, specific provision in the statute for judicial review has additional significance. *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 489.

We submit that the performance of the judicial function in such matters requires a judicial determination of the question whether the administrative agency has acted within its powers, and whether a fair hearing has been accorded. This duty, we submit, was not performed by the court's declaring that its members are equally divided over the question whether the action of the administrative body was proper, and that it is therefore unable to determine the issues presented to it.

CONCLUSION

The trial examiner found all the facts entitling Pacific Gas to a declaration that it is not a subsidiary of North American and recommended that such declaration be granted. The Commission acknowledged the correctness of the facts found by the trial examiner but reached a contrary conclusion by interpreting and applying the statute in what we have shown to be an erroneous manner. By reason of its error, the Commission, as we have pointed out, failed to consider and weigh the evidence in accord with its statutory duty, and denied the application because an unwarranted burden of demonstration was not thought by the Commission to have been sustained.

Pacific Gas is, and always has been, managed and controlled by Californians. It has been vigilant to prevent control or domination by holding companies or by any foreign interest. When independent utilities throughout the country were being bought up or otherwise brought under the control of holding companies, and when the evils were being practiced which finally resulted in the passage of the Holding Company Act, Pacific Gas not only preserved its independence but made a notable record of public service. The Commission now seeks to bring under its "protective custody" a utility that has always been able to maintain its independence through its own unaided efforts.

Having established its continuing ability to preserve its independence, Pacific Gas should not now be held to be a subsidiary of a holding company on the basis

of speculation as to what might conceivably happen at some future time under highly improbable circumstances, when such speculation is in conflict with all the evidence as to what has happened or may happen.

The Commission recognized that never in the eleven years that North American had been a stockholder of Pacific Gas had North American exercised a controlling influence over it nor engaged in a single transaction with it. It is now nine years since the enactment of the Act, one of the principal objectives of which is to restrict the control of local utility companies by holding companies and which requires divestment by such holding companies of control, or even interest in local utilities, other than those constituting a single geographical integrated system. The Commission has already promulgated an order requiring North American to dispose of its stock in Pacific Gas.

The Commission in its opinion speaks of "unrealities". Could anything be more unreal than to infer from this record, and in the face of these facts, that North American could by engaging in a proxy fight wrest control of this California company from its California management and directors, when 48% of its voting stock is owned in California, when there is a well established antagonism in the community to foreign domination or management, when holding companies as such, are generally regarded with disfavor, and when the very act of soliciting proxies for the purpose of gaining such control, is subject to the complete control of the Commission, which is charged

by the Act with the duty of restricting holding companies rather than of permitting their influence or control to be further extended?

It is respectfully submitted that the portion of the order which denies the application of Pacific Gas should be set aside.

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San Francisco,
November 11, 1944.

(APPENDIX FOLLOWS)

Appendix

AN ACT

To provide for control and regulation of public-utility holding companies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Utility Act of 1935".

TITLE I—CONTROL OF PUBLIC-UTILITY HOLDING COMPANIES

NECESSITY FOR CONTROL OF HOLDING COMPANIES

SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not

susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under cir-

cumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

DEFINITIONS

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * * * *

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission,

as hereinafter provided, by order declares such company not to be a holding company; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.

The Commission, upon application, shall by order declare that a company is not a holding company under clause (A) if the Commission finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised, and (iii) does not, directly or indirectly, exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be sub-

ject to the obligations, duties, and liabilities imposed in this title upon holding companies. The filing of an application hereunder in good faith by a company other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a holding company, until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of any order granting such application and as a part of any such order, the Commission may require the applicant to apply periodically for a renewal of such order and to do or refrain from doing such acts or things, in respect of exercise of voting rights, control over proxies, designation of officers and directors, existence of interlocking officers, directors and other relationships, and submission of periodic or special reports regarding affiliations or intercorporate relationships of the applicant, as the Commission may find necessary or appropriate to ensure that in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application of the company affected, shall revoke the order declaring such company not to be a holding company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such com-

pany, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order.

(8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; and

(B) any person the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies.

The Commission, upon application, shall by order declare that a company is not a subsidiary company of a

specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic

or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term "applicant" means only the company in respect of which the order is to be entered.

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POWER TO MAKE PARTICULAR EXEMPTIONS REGARDING HOLDING COMPANIES, SUBSIDIARY COMPANIES, AND AFFILIATES

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provi-

sion or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;

(3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company;

(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or

distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

(b) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any subsidiary company, as such, of a holding company from any provision or provisions of this title, the application of which to such subsidiary company the Commission finds is not necessary in the public interest or for the protection of investors, if such subsidiary company derives no material part of its income, directly or indirectly, from sources within the United States, and neither it nor any of its subsidiary companies is a public-utility company operating in the United States.

(c) Within a reasonable time after the receipt of an application for exemption under subsection (a) or (b), the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. The filing of an application in good faith under subsection (a) by a person other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant

as a holding company until the Commission has acted upon such application. The filing of an application in good faith under subsection (b) shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company until the Commission has acted upon such application. Whenever the Commission, on its own motion, or upon application by the holding company or any subsidiary company thereof exempted by any order issued under subsection (a), or by the subsidiary company exempted by any order issued under subsection (b), finds that the circumstances which gave rise to the issuance of such order no longer exist, the Commission shall by order revoke such order.

(d) The Commission may, by rules and regulations, conditionally or unconditionally exempt any specified class or classes of persons from the obligations, duties, or liabilities imposed upon such persons as subsidiary companies or affiliates under any provision or provisions of this title, and may provide within the extent of any such exemption that such specified class or classes or persons shall not be deemed subsidiary companies or affiliates within the meaning of any such provision or provisions, if and to the extent that it deems the exemption necessary or appropriate in the public interest or for the protection of investors or consumers and not contrary to the purposes of this title.

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COURT REVIEW OF ORDERS

SEC. 24 (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding be-

fore the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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SEC. 33. This title may be cited as the "Public Utility Holding Company Act of 1935."